

SEC90

W. Ross McKee
12/10/2019

1 UNITED STATES DISTRICT COURT
 2 FOR THE SOUTHERN DISTRICT OF NEW YORK
 3
 4 UNITED STATES SECURITIES)
 5 AND EXCHANGE COMMISSION,) Case No.
 6) 19-cv-5244 (AKH)
 7 Plaintiff,)
 8 vs.)
 9)
 10 KIK INTERACTIVE, INC.,)
 11)
 12 Defendant.)
 13
 14 _____
 15 VIDEOTAPED DEPOSITION OF W. ROSS F. MCKEE
 16 December 10, 2019
 17 9:09 a.m.
 18 Washington, D.C.
 19
 20
 21
 22
 23
 24 Reported by:
 25 Bonnie L. Russo
 25 JOB No. 191210BOR

1

3

1 APPEARANCES:
 2 On behalf of the Plaintiff:
 3 LAURA D'ALLAIRD, ESQ.
 4 DAVID MENDEL, ESQ.
 5 JEFF LEASURE, ESQ.
 6 U.S. SECURITIES and EXCHANGE COMMISSION
 7 100 F Street, N.E.
 8 Washington, D.C. 20549
 9 202-551-5475
 10 dallairdl@sec.gov
 11
 12 On behalf of the Defendant:
 13 LUKE T. CADIGAN, ESQ.
 14 MICHAEL E. WELSH, ESQ.
 15 COOLEY LLP
 16 500 Boylston Street
 17 Boston, Massachusetts 02116
 18 617-937-2480
 19 lcadigan@cooley.com
 20 mwelsh@cooley.com
 21
 22 On behalf of the Witness:
 23 ROBERT H. HOTZ, JR., ESQ.
 24 AKIN GUMP STRAUSS HAUER & FELD, LLP
 25 One Bryant Park
 18
 19 New York, New York 10036
 20 212-872-1000
 21 rhotz@akingump.com
 22
 23 Also Present:
 24 Glen Fortner, Videographer
 25

1 Videotaped Deposition of W. Ross F. McKee held
 2 at:
 3
 4
 5 United States
 6 Securities and Exchange Commission
 7 100 F Street, N.E.
 8 Washington, D.C.
 9
 10
 11
 12 Pursuant to Notice, when were present on behalf
 13 of the respective parties:
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

INDEX		PAGE
EXAMINATION OF W. ROSS F. MCKEE		8
EXHIBITS		
Exhibit 165 Subpoena		11
Exhibit 166 Coinlaw Article entitled "Blockchain Is a Challenge to Fundamental Assumptions - Ross McKee of Blake Cassels & Graydon		31
Exhibit 167 E-Mail Chain dated 7-7-17 MMLWM-00001215-224		49
Exhibit 168 E-Mail Chain dated 7-25-17 KIK_00115827-834		58
Exhibit 169 E-Mail Chain dated 8-25-17 SEC-OSC-E-0000061-65		233
Exhibit 170 E-Mail Chain dated 9-5-17 SEC-OSC-E-0000066-68		147
17		
18		
19		
20		
21		
22		
23		
24		
25		

2

4

W. Ross McKee
12/10/2019

1 PREVIOUSLY MARKED EXHIBITS:
 2 Exhibit 58 Letter dated 11-2-17
 3 Exhibit 59 Article entitled "Canadian
 Residents Excluded From
 Next Week's Kin TDE"
 4 Exhibit 109 News Release dated 3-8-17
 5 Exhibit 112 E-Mail Chain dated 8-3-17
 6 Exhibit 113 E-Mail Chain dated 8-14-17
 7 Exhibit 115 E-Mail Chain dated 8-22-17
 8 Exhibit 118 Notices/New Releases
 9 Exhibit 120 Letter dated 10-19-17
 10 Exhibit 124 E-Mail Chain dated 9-7-17
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 MR. MENDEL: David Mendel, here also
 2 for the Securities and Exchange Commission.
 3 MR. LEASURE: Jeff Leasure.
 4 MR. WELSH: Michael Welsh on behalf
 5 of Kik Interactive.
 6 MR. CADIGAN: Luke Cadigan, Cooley,
 7 on behalf of Kik Interactive.
 8 MR. HOTZ: Rob Hotz on behalf of
 9 Ross McKee.
 10 THE VIDEOGRAPHER: Will the court
 11 reporter please administer the oath.
 12
 13 W. ROSS F. McKEE,
 14 being first duly sworn, to tell the truth, the
 15 whole truth and nothing but the truth,
 16 testified as follows:
 17 MR. CADIGAN: Actually, before we
 18 get started, I'd just like to say one thing
 19 just to support the record.
 20 Obviously, it's highly irregular,
 21 not frowned upon, to take the testimony of the
 22 opposing party's counsel. Rather than moving
 23 to quash, we decided to take this on a
 24 question-by-question basis with the assumption
 25 that you are solely getting into conversations

5

7

PROCEEDINGS

1 THE VIDEOGRAPHER: This is Video
 2 No. 1 of the video deposition of Ross McKee
 3 taken by the plaintiff in the matter of the
 4 U.S. Securities and Exchange Commission v. Kik
 5 Interactive, Inc., pending before the U.S.
 6 District Court for the District of New York,
 7 Case No. 19-cv-5244.

8 This deposition is being held at the
 9 U.S. Securities and Exchange Commission, 100 F
 10 Street, Northeast, Washington, D.C., on
 11 December 10, 2019. The time on the video
 12 screen is 9:09.

13 My name is Glen Fortner. I'm the
 14 legal video specialist from the firm Gradillas
 15 Court Reporting, Inc. The court reporter today
 16 is Bonnie Russo in association with Gradillas
 17 Court Reporters, Inc.

18 For the record, will counsel now
 19 please introduce themselves and who they
 20 represent.

21 MS. D'ALLAIRD: Laura D'Allaird on
 22 behalf of the plaintiff, U.S. Securities and
 23 Exchange Commission.

1 with third parties, not privileged
 2 conversations.
 3 To the extent that there is any
 4 questions that get into privileged
 5 communications or his mental impressions, we're
 6 going to be instructing him not to answer.
 7 Again, we will take that on a
 8 question-by-question basis.

9 Just note that it's for the company,
 10 it's the company's privilege. Mr. McKee has no
 11 authority to waive that privilege and no waiver
 12 is intended by his testimony today.

13 MS. D'ALLAIRD: Okay. Understood.
 14 And I will just say for the record, that we are
 15 not seeking privileged information. However, I
 16 will be asking questions that perhaps you might
 17 think gets at privileged information and of
 18 course, you are at liberty to instruct the
 19 witness not to answer.

20 With that said, can we get started?

21 MR. CADIGAN: Yes, thank you.
 22 EXAMINATION BY COUNSEL FOR PLAINTIFF
 23 BY MS. D'ALLAIRD:
 24 Q. Good morning. Could you please
 25 state your full name and spell your name for

6

8

W. Ross McKee
12/10/2019

1 the record.
 2 A. Sure. My full name is William Ross
 3 Fraser McKee. William, Ross, R-O-S-S, Fraser,
 4 F-R-A-S-E-R, and McKee, M-C-K-E-E.
 5 Q. And, Mr. McKee, as I said a few
 6 moments ago, my name is Laura D'Allaird. I
 7 represent the SEC in its lawsuit against Kik
 8 Interactive.
 9 Today's deposition is being
 10 conducted in connection with that lawsuit and
 11 it's being conducted under the Federal Rules of
 12 Civil Procedure.
 13 Could you please state for me your
 14 home address?
 15 A. My home address is [REDACTED]
 16 [REDACTED].
 17 Q. Do you have any other personal
 18 addresses?
 19 A. No.
 20 Q. And addresses, business addresses or
 21 personal addresses in the United States?
 22 A. No.
 23 MS. D'ALLAIRD: If I could just
 24 clarify the record, we have counsel here for
 25 Kik. Are you also representing the witness?

9

1 rephrase as appropriate.
 2 We will also be taking periodic
 3 breaks throughout the day. However, if you
 4 feel you need a break, just let me know or let
 5 your counsel know and we will be happy to take
 6 a break. We just ask that if a question is
 7 pending, that you just answer the question
 8 before we actually go on break.
 9 Mr. McKee, you understand that you
 10 are under oath today?
 11 A. I do.
 12 Q. And are you taking any medication
 13 today that could affect your memory?
 14 A. No, I'm not.
 15 Q. Is there any reason that you can't
 16 give full and complete testimony today?
 17 A. No reason, no.
 18 (Deposition Exhibit 165 was marked
 19 for identification.)
 20 BY MS. D'ALLAIRD:
 21 Q. Mr. McKee, I have just handed to you
 22 what has been marked as Exhibit No. 165.
 23 Please take a moment to review and let me know
 24 when you are ready for questions.
 25 A. Do you want me to read the rules of

11

1 MR. CADIGAN: No, we are not
 2 representing him individually.
 3 BY MS. D'ALLAIRD:
 4 Q. Mr. McKee, have you ever been
 5 deposed before?
 6 A. No.
 7 Q. So I'm going to go over just a few
 8 basic ground rules for this proceeding.
 9 So as you can see, we have a court
 10 reporter here today who is going to transcribe
 11 everything that we say. Because everything is
 12 being written down, we need to try to keep a
 13 clear record so to do that, we need to try not
 14 to talk over one another. So please try your
 15 best to let me finish my question before you
 16 answer. It can be tempting to jump in, we
 17 know. You think you know where I am going with
 18 a question, please just let me finish it first
 19 before you answer.
 20 Because we are transcribing today's
 21 deposition, you need to give verbal responses
 22 so not a body gesture or a nod of the head.
 23 That won't be picked up by the transcript.
 24 If you don't understand a question,
 25 by all means let me know and I will try to

1 civil procedures first?
 2 Q. No. I'll just let you know what my
 3 question is.
 4 My question is going to be: Have
 5 you seen this before?
 6 A. No.
 7 Q. Do you recognize what it is?
 8 A. It's a subpoena, yes.
 9 Q. And you see that your name is under
 10 the subpoena to testify at a deposition in a
 11 civil action.
 12 Do you see that Ross McKee in care
 13 of Robert Hotz?
 14 A. I see my name, yes.
 15 Q. And there is a date set for the
 16 deposition which is 12-10-2019 at 9 a.m.
 17 Do you see that?
 18 A. Yes, I do.
 19 Q. Are you appearing here today
 20 pursuant to this subpoena, Exhibit 165?
 21 A. Yes, I guess I am. I believe my
 22 attorney accepted it on my behalf, so that's
 23 why I haven't seen it before.
 24 Q. Mr. McKee, what year were you born?
 25 A. 1954.

10

12

W. Ross McKee
12/10/2019

<p>1 Q. And where were you born? 2 A. Toronto, Canada. 3 Q. Where did you spend your childhood? 4 A. Toronto mostly. I lived in Montreal 5 for a few years as well when I was younger, 6 couple of years, age 5 to 7, but mostly 7 Toronto. 8 Q. So you've always lived in Canada? 9 A. Yes. 10 Q. And you went to college? 11 A. Yes, a university in Toronto, 12 University of Toronto, Trinity College. 13 Q. And did you receive any degrees 14 there from the University of Toronto? 15 A. Yes. I got a bachelor of arts in 16 geography. 17 Q. When did you receive that degree? 18 A. 1976. 19 Q. Do you have any other degrees? 20 A. I have a bachelor of law, which I 21 obtained in 1991 from Queens University at 22 Kingston also in Canada. 23 Q. And after you received your law 24 degree, were you ever admitted to practice law 25 anywhere?</p>	<p>1 and assuming you were signed off by your 2 articling principal, then you would be admitted 3 as a solicitor in the court and called to the 4 bar as a barrister, so a barrister and a 5 solicitor in the law society. 6 Q. When did you become a barrister, was 7 that also in 1983? 8 A. 1983. 9 Q. Other than the Ontario Bar, are you 10 admitted in any other bars? 11 A. No, I'm not. 12 Q. Are you admitted to practice law 13 anywhere in the United States? 14 A. No. 15 Q. After you were admitted to the 16 Ontario Bar, Mr. McKee, where did you work 17 after that? 18 A. I worked in Toronto for a firm 19 called Blakes Cassels & Graydon -- well, Blakes 20 Cassels & Graydon then, now Blakes Cassels & 21 Graydon, LLP, the same firm I'm with now. I 22 also worked for them as a summer student during 23 law school. 24 Q. Prior to attaining your -- 25 A. Yes. And I did my articles with</p>
<p>13</p>	<p>15</p>

1 **A.** Yes, I was admitted. I was an
 2 articling student and then admitted to practice
 3 law, what was then called the Law Society of
 4 Upper Canada and it's now called the Law
 5 Society of Ontario. I was called to the bar in
 6 1983.
 7 **Q.** You said that you were -- in between
 8 getting your law degree and being admitted to
 9 the Ontario Bar, you were an articling student.
 10 **A.** Yes.
 11 **Q.** What is that?
 12 **A.** In Canada -- in Ontario, it varies
 13 by province. When you graduate law school, you
 14 have an academic degree but you are not
 15 qualified as a lawyer so the process then and
 16 -- again, it's varied over the years but at my
 17 time, the process was that you would work as an
 18 indentured student for a lawyer for a year and
 19 work for that lawyer as an apprentice in a
 20 sense, but you are not actually entitled to
 21 practice law, and then at the end of your
 22 article year, you would then go to a bar
 23 admission course for six months run by the law
 24 society and you would pass a series of exams,
 25 and then at the end, having passed those exams

1 Blakes too, colloquially named Blakes.
 2 **Q.** So you have always worked at Blakes
 3 essentially after you received --
 4 **A.** Yes. Except, I did a secondment to
 5 the Ontario Securities Commission for a year
 6 and a half when I was a third-year lawyer.
 7 **Q.** A third-year lawyer so not a law
 8 student?
 9 **A.** No, 1986, 1985 -- 1985, 1986.
 10 **Q.** What was your -- what was your
 11 secondment? Can you describe that for me for
 12 the OSC?
 13 **A.** It was -- the OSC regularly took in
 14 lawyers from the street to work in the various
 15 offices of the OSC so I did six months in the
 16 corporate finance branch working as a corporate
 17 finance attorney, reviewing prospectuses and
 18 exemption applications.
 19 I worked six months in the
 20 enforcement branch as an enforcement counsel
 21 reviewing disciplinary actions with dealers,
 22 advisors, I was doing some hearings for the
 23 commission and then I did the last three months
 24 in the office of legal advisor, which was an
 25 office of lawyers who advised the chair of the

W. Ross McKee
12/10/2019

1 commission on policy matters, focusing
2 principally on beneficial shareholder
3 communications, OBOs and OBOs were the rules
4 that were coming into effect then.

5 Q. Just to clarify for the record, when
6 you say, "OSC," are you referring to the
7 Ontario Securities Commission?

8 A. Yes. Ontario Securities Commission,
9 OSC.

10 Q. And can you just tell me what is the
11 Ontario Securities Commission?

12 A. It is a crown agency, a creature of
13 statute under the Securities Act established in
14 Ontario. It is the statutory administrator of
15 the Ontario Securities Act and the Commodity
16 Futures Act in Ontario.

17 Q. And so you were on secondment in the
18 '80s at OSC for about -- was it a year and a
19 half --

20 A. Yes.

21 Q. -- did you say?

22 A. Something like that.

23 Q. During that time when you were in
24 enforcement, did you look at any matters
25 involving securities offerings?

1 both offering laws and dealer -- we refer to
2 registration in Canada as dealer registration,
3 advisor registration, not share registration,
4 that we call as prospectus qualification, so I
5 do both of those things.

6 I also advise exchanges,
7 marketplaces, clearing agencies on their
8 compliance side. I work on some cross-border
9 matters for Canadian issuers who are selling
10 into the United States, for example, or other
11 places, and so we would work with U.S. counsel
12 in satisfying the Canadian side of those
13 offerings, where they handle the U.S. aspect of
14 it.

15 Q. Are you familiar with the term
16 "cryptocurrency?"

17 A. Yes, I am.

18 Q. What does that mean to you?

19 A. Cryptocurrency is a digital form of
20 ownership of a particular asset that is
21 registered to an address on a blockchain and it
22 can be transferred from one address to another.
23 The address and the transaction is encrypted,
24 so that the ownership and it's replicated over
25 the network so that the ownership of the

17

19

1 A. I don't think so. I don't recall.
2 I think most of my actions were more on the
3 leader and compliance area which are called
4 broker-dealers here, so more on the
5 registration, regulatory compliance area.
6 There were some investigations going on for
7 matters but none that come to mind at this
8 point.

9 Q. Other than your secondment at the
10 OSC, have you always worked at -- I'm going to
11 refer to your firm as Blakes for ease of
12 reference.

13 You have always worked there?

14 A. Yes, that's right.

15 Q. And you are currently a partner at
16 the firm?

17 A. Yes, I am.

18 Q. And when did you become partner?

19 A. It would have been 1989.

20 Q. And what kind of law do you
21 practice?

22 A. I practice securities regulation. I
23 am part of our securities in capital markets
24 group and so I deal a lot of cross-border
25 matters, explaining Canadian securities laws,

1 particular asset in question is theoretically
2 immutable, meaning it can't be changed and
3 can't be -- and it could be any sort of asset.
4 Cryptocurrencies in particular are more focused
5 on whether the asset is used to transfer a
6 value of a thing, a value as opposed to
7 transfer of an article.

8 Q. Just a few more terms here for you.

9 Are you also familiar with the term
10 "digital asset?"

11 A. Yes, generally.

12 Q. Does that generally mean the same
13 thing as cryptocurrency to you?

14 A. Not necessarily, no. I would say
15 that cryptocurrency is probably a form of
16 digital assets, but not all digital assets are
17 cryptocurrencies. You could tokenize a share
18 of a company and have that represented on the
19 blockchain, that would be a digital asset, but
20 it wouldn't be a cryptocurrency.
21 Cryptocurrency is meant to be spent.

22 Q. What about digital tokens, is that
23 similar to cryptocurrency?

24 A. Well, cryptocurrencies are enabled
25 by digital tokens. They are a form of it.

18

20

W. Ross McKee
12/10/2019

1 They are more like a digitalized, a more
2 generic term.
3 **Q.** Have you also heard of the term
4 "cryptoasset?"
5 **A.** Yes, and again, it's a generic term
6 much like digital assets, in the sense, a
7 digital asset could be anything that is not
8 necessarily linked to the blockchain or
9 conventionally, it usually is. Cryptoasset is
10 something that is necessarily involved in the
11 blockchain and the encryption involved, but it
12 isn't necessarily a currency aspect.
13 **Q.** So if I understand you correctly,
14 and please correct me if I'm wrong.
15 When you say cryptocurrency, you are
16 referring to something that is specifically
17 tied to a blockchain or linked to the
18 blockchain?
19 **A.** Correct, and for payment purposes.
20 **Q.** And for payment purposes.
21 And digital asset, digital token or
22 cryptoassets to you are broader than
23 cryptocurrency?
24 **A.** In my thinking, yes.
25 **Q.** Meaning it can incorporate something

1 **Q.** For how long?
2 **A.** For how long? Well, in terms of the
3 more recent form of it, I would say since 2013.
4 **Q.** And when you say, "the more recent
5 form" of digital assets, what do you mean?
6 **A.** That was in the context of bitcoins
7 and so it was advice in connection with
8 bitcoins.
9 **Q.** Are you familiar with the term
10 "initial coin offering?"
11 **A.** Yes.
12 **Q.** Is that term also known as ICO?
13 **A.** Yes.
14 **Q.** And for ease of reference, I'm just
15 going to refer to it as ICO.
16 **A.** Sure.
17 **Q.** What do you understand an ICO to be?
18 **A.** An offering of tokens of some sort
19 on a blockchain for sale to persons or buyers.
20 **Q.** When did you first hear about ICOs?
21 **A.** First? I can't be certain as to the
22 specific date but it would have been towards
23 the end of 2016, early part of 2017 perhaps.
24 **Q.** Have you advised any clients on
25 ICOs?

21

23

1 that is not linked to a blockchain?
2 **A.** Well, a digital asset could be just
3 a book representation of a share, for example,
4 so one of the clearing agencies, DTC and so on,
5 they take book entry shares and they're all on
6 a digital record and comes off of some
7 spreadsheet somewhere, so that is a form of
8 digital but isn't blockchain necessarily or
9 encrypted.
10 Crypto is one that -- they're using
11 crypto because they are saying it's linked more
12 to encryption and the purpose of the encryption
13 is to enable blockchain certainty, so I'd say
14 in terms of shading, digital asset is the
15 broadest of possible terms. It could be
16 anything electronic whatsoever, encompassing
17 things that are not necessary blockchain.
18 Crypto is inferring it is involved
19 with blockchain things, cryptocurrency is
20 definitely blockchain.
21 **Q.** Let's take the broadest term then,
22 digital assets.
23 Have you ever advised clients on the
24 regulation of digital assets?
25 **A.** Ever? Yes.

1 **A.** Yes.
2 **Q.** And roughly, how many clients would
3 you say you have advised on ICOs?
4 **A.** Roughly, it would be -- a fair
5 qualification because I'm not certain, I
6 haven't done a count. I think to the best of
7 my recollection now, it would be four.
8 **Q.** Four clients. For ICOs?
9 **A.** For ICOs.
10 **Q.** How many clients did you advise on
11 ICOs prior to June of 2019?
12 **A.** Prior to June of 2019?
13 **Q.** Yes.
14 **A.** June this year.
15 **Q.** June this year.
16 **A.** Four.
17 **Q.** Four. Okay.
18 **A.** Again, to the best of my
19 recollection, there may be some smaller ones
20 that I've asked some questions and didn't
21 proceed. I don't specifically recall. Four is
22 the best I can come up with.
23 **Q.** Are you familiar with something that
24 is called the Howey test?
25 **A.** I am aware of it. I'm not saying I

22

24

W. Ross McKee
12/10/2019

1 am familiar. I know it's a reference to a U.S.
2 legal case and I'm not an expert in U.S. law,
3 but it's used colloquially as a general term in
4 cases that are referred to and in Canadian
5 cases as well.

6 Q. Have you read the case?

7 A. Howey? Yeah, I think so, yeah.

8 Q. What does -- what does Howey relate
9 to?

10 MR. CADIGAN: I'm going to object
11 and instruct him not to answer.

12 MS. D'ALLAIRD: On the basis of
13 what?

14 MR. CADIGAN: On the basis that
15 you're asking Kik's counsel his mental
16 impression regarding a legal standard that is
17 at issue in this case. Again, this is not a
18 nonprivileged conversation. This is not
19 something where he's a percipient witness to
20 discussions with third parties.

21 It's highly improper under -- and
22 you know the case law, Shelton V American
23 Motors. It is highly improper to take
24 testimony of the opposing party's counsel. The
25 only way that you can do so, that the

1 MR. CADIGAN: That's not what the
2 question was.

3 MS. D'ALLAIRD: Okay. Well, then,
4 I'm going to ask it that way.

5 MR. CADIGAN: Okay.

6 BY MS. D'ALLAIRD:

7 Q. Mr. McKee, do you know what the
8 subject matter of the Howey test is?

9 A. I'm not going to say no, because I'm
10 not an expert in the United States law and
11 Howey is a U.S. case. My understanding is that
12 it includes in it --

13 MR. CADIGAN: Actually, on this, I'm
14 just going to ask you to answer just generally
15 the topic.

16 THE WITNESS: Sure. So securities
17 regulation.

18 One thing -- sorry, can I turn off
19 my phone, it is buzzing in my pocket and I'm
20 just going to shut the -- go to airplane mode.

21 MS. D'ALLAIRD: Do you want to go
22 off the record.

23 THE WITNESS: No, if you're
24 wondering what I'm doing, that's what I'm
25 doing, I'm just going to airplane mode so I

25

27

1 information that you are seeking is
2 nonprivileged, if it is absolutely relevant to
3 your case and is something that only he could
4 provide.

5 Otherwise, you are simply mining
6 counsel for the opposing party's mental
7 impressions on the case. It's highly improper
8 and we're instructing him not to answer, and
9 we're going to instruct him not to answer
10 anything that gets into his mental impression.

11 Now, to the extent that you want to
12 get into his discussions with the OSC, that is
13 fair game.

14 MS. D'ALLAIRD: For the record, I'm
15 not -- to use your term, "mining" the witness
16 for his mental impressions.

17 MR. CADIGAN: You are asking for his
18 understanding of the Howey test. You are
19 asking --

20 MS. D'ALLAIRD: If you could just
21 let me finish, please. Let me speak and
22 finish.

23 I am asking if he understands what
24 the subject matter of the Howey test relates
25 to.

1 won't get buzzed.

2 BY MS. D'ALLAIRD:

3 Q. Thank you. We appreciate that.
4 Mr. McKee, I want to clarify for the
5 record, are you litigation counsel at Blakes?

6 A. No, I'm not.

7 Q. Are you a transactional attorney?

8 A. I'd say I'm transactional and
9 advisory.

10 Q. And has -- Kik's counsel said this
11 earlier.

12 You have been counsel to Kik?

13 A. Yes.

14 Q. Are you currently serving as counsel
15 for Kik?

16 A. Yes.

17 Q. In a litigation capacity?

18 MR. CADIGAN: Objection.

19 BY MS. D'ALLAIRD:

20 Q. You can answer.

21 A. Not in a sense of litigation. I'm
22 still giving security law advice, so I am not
23 giving advice about their action with the SEC.
24 That's not in my field of expertise.

25 Q. How long has Kik been a client of

26

28

W. Ross McKee
12/10/2019

1 yours?
 2 **A.** Since late May 2017.
 3 **Q.** And you say you were not retained in
 4 the litigation capacity?
 5 **A.** For this litigation, no. Our
 6 engagement for Kik started in May 2017 and has
 7 continued and they continue to be a client of
 8 the firm.
 9 **Q.** And to be clear for the record, is
 10 it the case that you are not representing Kik
 11 in this litigation?
 12 **A.** Correct, I am not representing Kik
 13 in this litigation.
 14 **Q.** Okay. Thank you.
 15 Mr. McKee, have you ever been
 16 interviewed about ICOs in any public media?
 17 **A.** I have been interviewed about
 18 securities regulation of blockchain and
 19 offerings on some of these specialized blogs
 20 and agencies. I don't recall a specific, but
 21 ICO focused in particular, but it may have come
 22 up during those.
 23 **Q.** Are you familiar with something
 24 called "Coinlaw?"
 25 **A.** Yes.

1 point, no.
 2 **Q.** And at that time, did you reach out
 3 to Coinlaw to correct anything in your
 4 interview?
 5 **A.** I don't recall.
 6 **Q.** But sitting here today, you don't
 7 recall?
 8 **A.** Right. I don't recall.
 9 **Q.** Okay.
 10 (Deposition Exhibit 166 was marked
 11 for identification.)
 12 BY MS. D'ALLAIRD:
 13 **Q.** Mr. McKee, I have just handed to you
 14 what has now been marked as Exhibit 166. It is
 15 an exhibit of seven pages.
 16 The first page has a title at the
 17 top that reads: "Blockchain is a Challenge to
 18 Fundamental Assumptions-Ross McKee of Blakes
 19 Cassels & Graydon."
 20 If you turn to the very last page,
 21 there is a date at the very top of May 7, 2019.
 22 Please take a moment to review this
 23 and let me know when you are ready for my
 24 questions.
 25 **A.** Sure.

29

31

1 **Q.** What is Coinlaw?
 2 **A.** Coinlaw is a blog that specializes
 3 on the application of law to cryptocurrency and
 4 the use of cryptocurrency.
 5 **Q.** Have you ever been interviewed by
 6 Coinlaw?
 7 **A.** Yes, I was.
 8 **Q.** And when were you interviewed?
 9 **A.** I believe earlier this year. I
 10 can't recall when specifically.
 11 **Q.** Was it May 2019?
 12 **A.** That sounds about right.
 13 **Q.** And was your interview with Coinlaw
 14 published?
 15 **A.** I believe it was on the Internet,
 16 yes.
 17 **Q.** When it was published, did you
 18 read --
 19 **A.** Yes.
 20 **Q.** -- the interview?
 21 **A.** Yes.
 22 **Q.** And did you notice any inaccuracies
 23 in the transcription of your interview with
 24 Coinlaw?
 25 **A.** I don't recall anything at this

1 MR. HOTZ: I'll note for the record
 2 that there are a couple of sentences that
 3 appear cut off on my copy.
 4 THE WITNESS: Mine as well.
 5 MR. MENDEL: Counsel, which
 6 sentences are you referring to?
 7 MR. HOTZ: I'm referring, on the
 8 bottom of Page 3, top of Page 4.
 9 MR. MENDEL: On the bottom of Page
 10 3, are you referring to?
 11 MR. HOTZ: Top of 4.
 12 MR. MENDEL: Is it the line on the
 13 bottom of Page 3: "Determined to be securities
 14 and therefore they're leaving alone the
 15 assets."
 16 Is that the one?
 17 MR. HOTZ: I can't read the second
 18 -- it is cut off, literally, like, the half of
 19 that. Want to look at my copy? It's cut off
 20 right on the half.
 21 And if you look at the next page,
 22 it's tough to read the next sentence as well on
 23 the top of the next page.
 24 MR. MENDEL: Okay.
 25 MS. D'ALLAIRD: So you can't

30

32

W. Ross McKee
12/10/2019

1 recognize that as: "Determined to be
2 securities and therefore, they're leaving alone
3 the assets?"
4 MR. HOTZ: No.
5 MS. D'ALLAIRD: You cannot. Okay.
6 MR. HOTZ: And then on the next
7 page, since you are doing it, you might as well
8 read that one into the record, too.
9 The top of 4, I can't read that one
10 at all. Is that the same sentence?
11 MS. D'ALLAIRD: That looks to be the
12 same sentence.
13 MR. HOTZ: I don't know, I can't --
14 MS. D'ALLAIRD: "Determined to be
15 securities and therefore, they're leaving alone
16 the assets."
17 Next page: "That they determined
18 not to be securities or which they can't prove
19 to be securities."
20 MR. HOTZ: If that's what it says,
21 that's what it says. Mine is not clear.
22 But go ahead with your examination.
23 THE WITNESS: Why is the pagination
24 different? There's a line different. All
25 right. Go ahead.

1 question, a little -- halfway down on the
2 second page in bold, it states: "What's your
3 take on the shift from ICOs to STOs. Do you
4 think this is a positive development."
5 Do you see that question?
6 A. Yes, I do.
7 Q. What is your understanding of what
8 an STO is?
9 A. It's a securities token offering and
10 it is like an ICO except it has rules baked
11 into the blockchain so that the token itself
12 can only be transferred in accordance with the
13 securities laws of a particular jurisdiction
14 that applies to it.
15 So for example, it won't let itself
16 be sold to someone who is not an accredited
17 investor or won't let itself be sold to more
18 than 300 people in the United States, for
19 example, if those were the rules. And those
20 rules are baked into the transfer system so
21 it's not like an ICO which is transferable to
22 anybody at any time. It's only transferable if
23 it meets certain requirements.
24 Q. So is it the case that ICOs may or
25 may not comply with securities laws but STOs

33

35

1 BY MS. D'ALLAIRD:
2 Q. Are you ready for questions?
3 A. Uh-huh.
4 Q. Mr. McKee, do you recognize this
5 document?
6 A. Yes, I do.
7 Q. Is this the May 2019 Coinlaw article
8 that you were discussing a few minutes ago?
9 A. Yes. It's actually a transcript of
10 a podcast. It wasn't published -- it wasn't
11 printed as an article. It was a podcast
12 interview and this is essentially a transcript.
13 Q. It was a podcast, meaning it was
14 broadcast live, it was verbal?
15 A. I don't know. I just did the
16 interview part. I didn't do the podcast part.
17 Q. And this is a transcription of that
18 podcast?
19 A. Yes, I believe so.
20 Q. To the best of your knowledge?
21 A. Yes. It may have been edited from
22 the transcript. I didn't see a transcript.
23 Q. I want to take a look at a couple of
24 your answers.
25 If you turn to Page 2, there is a

1 do?
2 MR. HOTZ: Objection to form.
3 THE WITNESS: I think that STOs are
4 intended to be designed to comply with
5 securities laws and that's not necessarily the
6 case. ICOs don't have transfer restrictions
7 built into the ICO mechanism itself.
8 BY MS. D'ALLAIRD:
9 Q. I'm going to read your answer to
10 this question, part of it into the record.
11 "I think it's a very positive
12 development. I think ICOs have been
13 problematic for many reasons, not the least of
14 which is that they created an image that it was
15 a bit of a wild west situation in the crypto
16 sphere. I remember when I first started
17 hearing about ICOs, I was thinking that I was a
18 terrible securities lawyer because I couldn't
19 think of how they were doing these offerings
20 legally. I thought that there must be some
21 exemption that I'm not smart enough to think of
22 that would apply to these, but gradually, I
23 came to realize that, in fact, there was no
24 exemption at all and that many of these ICOs,
25 if not most of them, were clearly securities,

34

36

W. Ross McKee
12/10/2019

1 and they were entirely unregulated on the basis
 2 that some people thought it was a new thing and
 3 that the rules didn't apply. That's like
 4 people selling stuff over the Internet and
 5 thinking, because I can sell it on the
 6 Internet, that means that no rules apply and we
 7 all know that is no longer the case."

8 Did I read that accurately, Mr.
 9 McKee?

10 A. Yes, you did.

11 Q. And is what I just read an accurate
 12 transcription of what you said in the Coinlaw
 13 interview?

14 A. Yes, I believe it is.

15 Q. I would like to look at your answer
 16 to the next question in bold towards the bottom
 17 of that same second page of Exhibit 166.

18 The question is: "Is there a
 19 difference in the legal approach to crypto
 20 assets between Canada and the U.S."

21 Do you see that?

22 A. Yes, I do.

23 Q. And I'm going to read part of your
 24 response into the record.

25 "There are more similarities than

1 MR. CADIGAN: Object to form.

2 THE WITNESS: I mean, I said already
 3 that I am familiar with the Howey case in the
 4 same sense here. I'm not familiar as an expert
 5 in the sense that lots of lay people have heard
 6 of the Howey test and oranges and so on, and so
 7 I am no more familiar than they are.

8 So I am roughly familiar with what
 9 it's about in some case, but the point of what
 10 I am saying here is that that case has been
 11 adopted in Canadian case law, and so what I am
 12 saying is the Canadian case law has referred to
 13 the Howey test in Canadian case law where I am
 14 an expert so I'm aware of it, it has been
 15 referred to and -- they don't -- they can't
 16 adopt U.S. law but it has been referred to in
 17 Canadian cases. So that's the aspect of what
 18 I'm familiar.

19 BY MS. D'ALLAIRD:

20 Q. To your knowledge, does the Howey
 21 case relate to what is an investment contract
 22 in U.S. securities law?

23 A. Yes. Do you want that back?

24 Q. Yes.

25 A. Do you want the subpoena back as

37

39

1 differences in the leading case about what is
 2 the definition of an investment contract. The
 3 Supreme Court of Canada had adopted many of the
 4 U.S. common law tests for investment contracts,
 5 the famous Howey case and others. So the U.S.
 6 tests for when an investment contract is
 7 considered a security are largely similar to
 8 the legal tests used in Canada. Canada's
 9 common law is heavily influenced by the U.S.
 10 common law in that regard. So I would say that
 11 in global terms, the U.S. and Canada are very
 12 similar in how they interpret whether something
 13 is a security or not. The approach is a little
 14 bit different beyond that because we don't have
 15 separate commodity trading regulators such as
 16 the CFTC in U.S. and Canada. It tends to be
 17 lumped under the same regulator."

18 Did I read that quote accurately?

19 A. Yes.

20 Q. Is that an accurate transcription of
 21 what you said in your Coinlaw interview?

22 A. I believe it was, yes.

23 Q. Does that refresh your recollection
 24 as to your familiarity with the Howey case?

25 MR. HOTZ: Objection.

1 well?

2 Q. Yes. Thank you.

3 Mr. McKee, you stated earlier that
 4 you had been retained by Kik I think back in
 5 early 2017; is that right?

6 A. That's right, May -- late May 2017,
 7 yes.

8 Q. May of 2017. And what was the
 9 subject matter of your retention?

10 A. We were retained to advise Kik in
 11 connection with its pending sale of Kin tokens.

12 Q. And when you say, "we," who are you
 13 referring to?

14 A. Blakes.

15 Q. Blakes, the firm?

16 A. Yes.

17 Q. And that included you?

18 A. Yes.

19 Q. Any other attorneys at Blakes?

20 A. I wasn't the originating lawyer
 21 originally. I didn't have the original contact
 22 with Kik and the staff there. A different
 23 lawyer at Blakes had that connection and was
 24 referred to me internally at the firm given my
 25 expertise.

38

40

W. Ross McKee
12/10/2019

1 **Q.** Your expertise being what?
 2 **A.** Securities generally and blockchain
 3 matters in particular. I have taken an
 4 interest in that in particular and I was known
 5 in the firm as being the securities regulation
 6 blockchain person.
 7 **Q.** Is it fair to say that you were
 8 retained to provide legal advice to Kik as to
 9 securities law, Canadian securities law, in
 10 relation to its sale of Kin tokens?
 11 **A.** Yes, that's fair.
 12 **Q.** You referred to being retained in
 13 relation to Kik sale of Kin tokens.
 14 When did -- did Kik sell Kin tokens
 15 at some point in time?
 16 **A.** Yes. They sold them in a -- they
 17 sold Kin tokens themselves in September 2017.
 18 They sold some SAFTs, the simple agreements for
 19 future tokens relating to the Kin tokens
 20 earlier in 2017.
 21 **Q.** You said there were SAFTs and then
 22 offerings to other individuals; is that right?
 23 **A.** Yes, as far as I am aware.
 24 **Q.** What are -- you said what SAFT
 25 stands for, but what are they to your

1 **MR. HOTZ:** Yes or no.
 2 **THE WITNESS:** Yes.
 3 **BY MS. D'ALLAIRD:**
 4 **Q.** When you were retained to provide
 5 legal advice to Kik with respect to its sale of
 6 Kin tokens, did you anticipate any potential
 7 litigation to Kik in relation to that sale?
 8 **MR. CADIGAN:** Objection.
 9 **MR. HOTZ:** Objection.
 10 **MS. D'ALLAIRD:** If I could just
 11 finish my question.
 12 **THE WITNESS:** Anticipate? No, I
 13 didn't anticipate any. We were seeking to
 14 provide regulatory advice so they wouldn't get
 15 in trouble.
 16 **BY MS. D'ALLAIRD:**
 17 **Q.** When you say, "regulatory advice,"
 18 you mean in relation to Canadian regulators?
 19 **A.** Local regulators. There is no
 20 Canadian securities law. There is no federal
 21 securities law. It's a series of provincial
 22 ones. Based in Ontario, Kik's headquarters is
 23 Ontario, so it's Ontario's securities law that
 24 would apply to their offerings. If they sold
 25 tokens to other persons elsewhere in Canada,

41

43

1 knowledge?
 2 **A.** It's an agreement under which the
 3 company entered into with a purchaser where the
 4 purchaser pays some funds to the company and
 5 the company agrees with them that they will
 6 give them the right to acquire the tokens when
 7 they are eventually issued at a fixed price.
 8 **Q.** And when did Kik sell SAFTs for Kin
 9 tokens?
 10 **A.** I'm aware -- I don't know globally.
 11 We were only involved in the particular
 12 reporting of transactions that had been done in
 13 Canada and they turned out to be only in the
 14 Province of Ontario. And from the records that
 15 were given to us by Kik, they were sold during
 16 the time period from July, August, September
 17 2017.
 18 **Q.** You said that Kik also sold Kin
 19 tokens to the public?
 20 **A.** Yes, later in September.
 21 **Q.** Did Kik sell tokens to the public in
 22 Canada?
 23 **A.** No, they did not.
 24 **Q.** You were retained to advise on that?
 25 **A.** Well --

1 then the particular laws of those particular
 2 provinces or territories would apply, so it's
 3 all of those.
 4 Can I amend an answer? The
 5 anticipation of litigation one has me a little
 6 bit -- because I know that's a loaded term. It
 7 wasn't anticipation of a specific lawsuit, you
 8 know, it was like a defendant in that. It's in
 9 general, giving legal advice to avoid putting
 10 oneself in a situation where there are problems
 11 with a regulator or elsewhere, so that you will
 12 not be getting in trouble and there won't be
 13 litigation eventually brought, so in a sense,
 14 it's in contemplation of avoiding litigation.
 15 **Q.** So taking the answer that you just
 16 gave, did you anticipate any specific
 17 litigation against Kik --
 18 **A.** No.
 19 **Q.** -- in relation to a sale of Kin
 20 tokens?
 21 **MR. CADIGAN:** Objection. I'm going
 22 to instruct him not to answer.
 23 **MR. MENDEL:** How is that privileged?
 24 **MR. CADIGAN:** You guys are getting
 25 into his mental impressions.

42

44

W. Ross McKee
12/10/2019

<p>1 BY MS. D'ALLAIRD:</p> <p>2 Q. Are you going to not answer on the</p> <p>3 basis of the instruction?</p> <p>4 A. Correct.</p> <p>5 MR. MENDEL: Isn't that putting the</p> <p>6 cart before the horse? I mean, to say you're</p> <p>7 getting into mental impressions, you need to</p> <p>8 anticipate a certain litigation.</p> <p>9 MR. CADIGAN: No, you don't</p> <p>10 actually. Any time you take the testimony of</p> <p>11 the opposing party's counsel, you have the</p> <p>12 threshold, the burden of showing that it's</p> <p>13 absolutely necessary to your case that he is</p> <p>14 the only person that can provide this</p> <p>15 information and that this information is -- is</p> <p>16 not privileged in order to get over that</p> <p>17 barrier.</p> <p>18 In this case, you are going into</p> <p>19 what only can come from discussions that he had</p> <p>20 with his client over the engagement and the</p> <p>21 reasons that he was being engaged. He can't</p> <p>22 answer that question, which is -- first of all,</p> <p>23 only his side of the answer as opposed to the</p> <p>24 client's side of the answer as to what their</p> <p>25 intention was in retaining him, but you can't</p>	<p>1 record, I think we should just move on with the</p> <p>2 deposition.</p> <p>3 MR. CADIGAN: Yes, and again, to the</p> <p>4 extent that you want to ask him about public</p> <p>5 statements he made or communications he had,</p> <p>6 other than with Kik, that's fair game. That</p> <p>7 was what I thought you were going to be doing</p> <p>8 today.</p> <p>9 MR. MENDEL: We can agree to</p> <p>10 disagree.</p> <p>11 MS. D'ALLAIRD: Are you done?</p> <p>12 MR. CADIGAN: Yes.</p> <p>13 BY MS. D'ALLAIRD:</p> <p>14 Q. Mr. McKee, was a decision made at</p> <p>15 one point to approach the OSC regarding Kik's</p> <p>16 planned offering of Kin tokens?</p> <p>17 A. Yes.</p> <p>18 Q. When was that decision made?</p> <p>19 A. It would have been made in either</p> <p>20 late June, early July 2017.</p> <p>21 Q. How did that decision come about?</p> <p>22 MR. HOTZ: Objection.</p> <p>23 THE WITNESS: I don't think I can</p> <p>24 answer that question.</p> <p>25 BY MS. D'ALLAIRD:</p>
<p>45</p> <p>1 get into any of that without getting into</p> <p>2 communications that he had with his client.</p> <p>3 And the only basis he has for even</p> <p>4 answering that question is based upon his</p> <p>5 communications with the client and to the</p> <p>6 extent there was an answer on the record, we</p> <p>7 move to strike that.</p> <p>8 MR. MENDEL: I think in order to</p> <p>9 answer whether -- a response of work product,</p> <p>10 we need to know if there was a litigation</p> <p>11 anticipated. That's my only point, Counsel.</p> <p>12 MR. CADIGAN: And my only point is,</p> <p>13 in order to get into that, you need to be able</p> <p>14 to get into the communications that he had with</p> <p>15 his client on those topics, and first of all, I</p> <p>16 have no idea why any of this is relevant given</p> <p>17 that you have brought a strict liability case</p> <p>18 under U.S. law, and now you are -- as I said</p> <p>19 before and I will stick with that, mining the</p> <p>20 mental impressions of Canadian counsel for the</p> <p>21 opposing party.</p> <p>22 MR. MENDEL: That's your</p> <p>23 characterization of what we're doing, Counsel.</p> <p>24 That's your characterization of what is</p> <p>25 relevant and so rather than clutter up the</p>	<p>47</p> <p>1 Q. You can't tell me how it came about</p> <p>2 on the basis of --</p> <p>3 A. I think that's in connection with my</p> <p>4 advice to my client, so I have to decline to</p> <p>5 answer under the professional privilege</p> <p>6 requirement.</p> <p>7 Q. Who was involved in making the</p> <p>8 decision to approach the OSC with respect to</p> <p>9 Kik's offering of Kin tokens?</p> <p>10 A. It would have been myself and senior</p> <p>11 officers of Kik, and I think their U.S. legal</p> <p>12 counsel was part of it, as part of the general</p> <p>13 legal advisory group.</p> <p>14 Q. Which senior officers of Kik were</p> <p>15 involved in the decision?</p> <p>16 A. Primarily, Peter Heinke and Tanner</p> <p>17 Philp.</p> <p>18 Q. Who is Peter Heinke?</p> <p>19 A. He's the chief financial officer of</p> <p>20 Kik, was the chief financial officer of Kik.</p> <p>21 Q. Who is Tanner Philp?</p> <p>22 A. He's a program manager for the Kin</p> <p>23 project.</p> <p>24 Q. Any other senior officers at Kik</p> <p>25 involved in the decision to approach the OSC?</p>

W. Ross McKee
12/10/2019

1 **A.** I cannot recall whether the CEO was
2 directly participating in the calls or not at
3 this point.
4 **Q.** You mentioned that Kik's U.S. legal
5 counsel is involved in the decision to approach
6 the OSC?
7 **A.** They were part of the discussions
8 overall.
9 **Q.** Who specifically are you referring
10 to?
11 **A.** Nancy Wojtas, counsel from Cooley.
12 **Q.** Anyone else among Kik's U.S. legal
13 counsel involved in that decision?
14 **A.** I don't recall any other names, no.
15 **Q.** Anyone else at Blakes other than
16 yourself?
17 **A.** No, I don't think so.
18 **Q.** Other than legal counsel and senior
19 officers of Kik, was anyone else involved in
20 the decision to approach the OSC about Kik's
21 offering of Kin?
22 **A.** I don't recall any other names, no.
23 (Deposition Exhibit 167 was marked
24 for identification.)
25 BY MS. D'ALLAIRD:

1 as to what this e-mail chain relates to?
2 **A.** It probably relates to --
3 MR. HOTZ: I will instruct the
4 witness not to reveal the privilege in the
5 context of answering your question.
6 THE WITNESS: Yeah. I mean, now
7 that I see William Mougayar was an advisor to
8 Kik, so he may have participated in some of
9 these discussions in the early stages about
10 what the company ought to be doing. But I
11 can't recall the specifics of these particular
12 e-mails.
13 BY MS. D'ALLAIRD:
14 **Q.** You say that William Mougayer was an
15 advisor to Kik?
16 **A.** Yes.
17 **Q.** What is your understanding that he
18 was advising Kik on at this time?
19 **A.** He is a blockchain expert. He wrote
20 a book called blockchain -- "Business
21 Blockchain," and so he was giving them advice
22 on economics and token economics and so on.
23 **Q.** And do you recall if he was giving
24 Kik advice on whether to approach the OSC about
25 his offering of Kin?

49

51

1 **Q.** Mr. McKee, I've just handed to you
2 what has now been marked as Deposition Exhibit
3 167. It is an e-mail.
4 The top chain -- the top of the
5 e-mail on the very first page is dated July 7,
6 2017, from an individual named William
7 Mougayar, M-O-U-G-A-Y-A-R, to Peter Heinke,
8 H-E-I-N-K-E. This document bears a Bates range
9 of MMLWM-00001215 through MMLWM-00001224.
10 Please take a minute to review and
11 let me know when you are ready for my
12 questions.
13 **A.** Yep, I'm ready.
14 **Q.** Mr. McKee, do you recognize this
15 e-mail chain?
16 **A.** Not particularly, no. There is no
17 subject in any of it at all. It says:
18 "Redacted for privilege," so the names are
19 familiar to me but I have no idea what the
20 e-mails are about.
21 **Q.** I note that there is a subject line
22 that we can see throughout this document. That
23 is "OSC comment."
24 **A.** Yep.
25 **Q.** Does that refresh your recollection

1 **A.** I don't recall.
2 **Q.** At this time, in July of 2017, do
3 you know if Mr. Mougayar had a formal agreement
4 in place with Kik?
5 **A.** I don't know.
6 **Q.** Did you communicate with Mr.
7 Mougayar about potentially approaching the OSC
8 regarding Kik's offering of Kin?
9 MR. HOTZ: Yes or no.
10 THE WITNESS: Yes, broadly, yes.
11 MR. CADIGAN: I'm sorry, what was
12 that answer?
13 THE WITNESS: Yes. Sorry.
14 BY MS. D'ALLAIRD:
15 **Q.** As you noted earlier, Mr. McKee,
16 throughout this chain, the body of each e-mail
17 has a box around it stating: "Redacted for
18 privilege," and we cannot see the text or the
19 content of each e-mail.
20 I'm going to ask on the record, what
21 is the substance of these conversations?
22 MR. CADIGAN: Objection. Instruct
23 not to answer. At the outset, you said you
24 were not looking for privileged communication.
25 MS. D'ALLAIRD: I don't know that

50

52

W. Ross McKee
12/10/2019

<p>1 we've established these communications are 2 privileged.</p> <p>3 MR. HOTZ: The ones that we redacted 4 for privilege? You did not -- okay. I 5 instruct the witness not to answer.</p> <p>6 THE WITNESS: Okay.</p> <p>7 BY MS. D'ALLAIRD:</p> <p>8 Q. You're not going to answer based on 9 that instruction by Kik's counsel?</p> <p>10 A. Correct.</p> <p>11 Q. Do you specifically recall 12 communicating with Mr. Mougayar in order to 13 provide Kik with legal advice relating to its 14 offering of Kin?</p> <p>15 A. In order to provide Kik legal 16 advice?</p> <p>17 Q. Yes.</p> <p>18 MR. CADIGAN: Objection.</p> <p>19 BY MS. D'ALLAIRD:</p> <p>20 Q. You can answer.</p> <p>21 A. I mean, in the overall context of my 22 legal advice generally, Mr. Mougayar was part 23 of numerous conversations. I wasn't using him 24 as a conduit to get to Kik if that's what your 25 question is inferring. He was part of the</p>	<p>1 I telephoned first to find out who 2 was the right person to contact and then I 3 wrote a letter.</p> <p>4 Q. And you telephoned the OSC first to 5 find out who would be best to contact relating 6 to Kik's offering of Kin?</p> <p>7 A. Yes.</p> <p>8 Q. Who did they -- who did you speak 9 with at the OSC?</p> <p>10 A. I spoke -- I tried to speak with Pat 11 Chaukos and she was absent and so I spoke with 12 the second team member on the team, Amy Tsai, 13 T-S-A-I.</p> <p>14 Q. And Amy Tsai told you then who to 15 reach out to?</p> <p>16 A. Who to address, how the process was, 17 to send us the letter.</p> <p>18 Q. And you said you tried to talk to 19 Pat Chaukos first. How did you know to try to 20 talk to Pat Chaukos?</p> <p>21 A. She was the director of the OSC 22 LaunchPad project.</p> <p>23 Q. Did you know her prior to reaching 24 out to her regarding --</p> <p>25 A. Not particularly. I hadn't come</p>
<p>53</p> <p>1 project team.</p> <p>2 Q. He was part of the project team.</p> <p>3 Was he essential to your providing</p> <p>4 legal advice to Kik?</p> <p>5 MR. CADIGAN: Objection.</p> <p>6 BY MS. D'ALLAIRD:</p> <p>7 Q. Just yes or no.</p> <p>8 A. No.</p> <p>9 Q. You can give that back to me. Thank</p> <p>10 you.</p> <p>11 Moving forward, Mr. McKee, did you</p> <p>12 eventually reach out to the OSC on Kik's behalf</p> <p>13 relating to Kik's offering of Kin?</p> <p>14 A. Yes.</p> <p>15 Q. When was that?</p> <p>16 A. In July 2017.</p> <p>17 Q. And how did you reach out to the</p> <p>18 OSC?</p> <p>19 A. The OSC had formed a project team</p> <p>20 called OSC LaunchPad with much fanfare and</p> <p>21 fancy graphics. They advertised themselves as</p> <p>22 being a new way of doing business, give</p> <p>23 guidance, they were flexible, given the new</p> <p>24 economy and so on, and so we thought we could</p> <p>25 contact them.</p>	<p>55</p> <p>1 across her before in the OSC staff but when the</p> <p>2 LaunchPad initiative had been announced earlier</p> <p>3 in the year, I thought it was an interesting</p> <p>4 idea and I reached out to her by telephone</p> <p>5 inviting her to lunch so we could chat about it</p> <p>6 and I never heard back.</p> <p>7 Q. So after you spoke with Amy Tsai,</p> <p>8 she told you to reach out to Ms. Chaukos; is</p> <p>9 that right?</p> <p>10 A. No. She said the thing was, to send</p> <p>11 a letter into the OSC LaunchPad and they would</p> <p>12 -- the OSC has a portal as well, and the</p> <p>13 question, one of my questions was, do we have</p> <p>14 to send this through the document portal or I</p> <p>15 can send an e-mail or what's the --</p> <p>16 functionally, how do we get things onto your</p> <p>17 OSC LaunchPad radar.</p> <p>18 Q. So you sent a letter in?</p> <p>19 A. Yes.</p> <p>20 Q. And tell me about that letter.</p> <p>21 What did you say in that letter to</p> <p>22 the OSC?</p> <p>23 A. It was an explanation of the</p> <p>24 background. There had been some media reports</p> <p>25 about the potential Kik offering, the media</p>

W. Ross McKee
12/10/2019

1 language had been somewhat vague and broad and
2 somewhat inaccurate, and so there was some
3 concern that maybe the OSC was thinking Kik was
4 doing -- Kin -- or Kik was doing something that
5 they were not actually doing, so the purpose of
6 the letter was to say, here's what they are
7 actually doing, here's accurately setting out
8 what is in here and why we think it is in
9 compliance with securities law and if you have
10 any concerns, do let us know.

11 Q. Why did you think that the OSC might
12 have some concerns based on what was being
13 reported in the media about Kik's offering of
14 Kin?

15 MR. HOTZ: Objection.

16 THE WITNESS: I think that the media
17 reports, and I don't recall the specifics of
18 any particular media report at this point, but
19 they were in the context of these broader ICOs,
20 I think I referred to it like the wild west in
21 my article. We didn't believe that Kin was
22 that type of offering. I said many were
23 securities, but doesn't mean all, and we
24 believed this was a different -- fundamentally
25 different type of offering and the newspaper

1 The top of which is dated Tuesday,
2 July 25, 2017. The Bates stamp on the e-mail
3 is Kik_00115827 through 5828. This exhibit
4 includes its attachments which is a letter
5 dated July 25, 2017, bearing a Bates range of
6 Kik_00115829 through Kik_00115834.

7 Please take a moment to review and
8 let me know when you are ready for my
9 questions.

10 A. Okay. Okay.

11 Q. Mr. McKee, do you recognize the
12 cover e-mail of Exhibit 168?

13 A. Yes, I do.

14 Q. Did you forward the e-mail at the
15 very top of the chain that we see here at
16 Exhibit 168?

17 A. Yes, I did.

18 Q. And what is this e-mail that you
19 have forwarded?

20 Do you see there is an e-mail at the
21 bottom of the first page.

22 A. Right. That is the cover e-mail
23 through which I delivered the letter to Pat
24 Chaukos at the OSC and Amy Tsai who I've
25 mentioned earlier on and also Monica Kowal who

57

59

1 articles that -- broadbrushing everything all
2 together, so we were trying to say, look, this
3 is not that type of thing.

4 That type of ICOs that were going
5 and raising money from people to go and build
6 something, that will promise maybe it will
7 happen. It's a different type of offering and
8 we wanted to -- so far as possible, get
9 confirmation from the OSC that they agreed with
10 our position.

11 BY MS. D'ALLAIRD:

12 Q. And your position was that -- if you
13 can clarify for me, what was your position that
14 you represented to the OSC?

15 A. That Kin tokens were not securities.
16 This was not distribution of securities.

17 Q. And, therefore, would not be subject
18 to Ontario Securities Commission regulations?

19 A. That's right.

20 (Deposition Exhibit 168 was marked
21 for identification.)

22 BY MS. D'ALLAIRD:

23 Q. Mr. McKee, I have just handed to you
24 what has now been marked as Deposition Exhibit
25 168. It is an e-mail.

1 was the vice-chair of the commission.

2 Q. And we see their e-mails in that
3 bottom e-mail --

4 A. Yes.

5 Q. -- on Exhibit 168; is that right?

6 A. Yes.

7 Q. And then you forward that e-mail,
8 the cover e-mail and its attached letter,
9 looking up at the very top of page -- of
10 Exhibit 168 to Nancy Wojtas and then I see
11 Peter Heinke next to that as well.

12 A. Yes.

13 Q. And you said earlier that Nancy
14 Wojtas was Kik's U.S. legal counsel?

15 A. Right.

16 Q. And Mr. Heinke at that time was
17 Kik's CFO?

18 A. Yes.

19 Q. Why were you forwarding your e-mail
20 and letter to the OSC, to Kik's U.S. legal
21 counsel?

22 MR. HOTZ: Objection and instruction
23 not to answer.

24 MS. D'ALLAIRD: On the basis of
25 what?

58

60

W. Ross McKee
12/10/2019

<p>1 MR. CADIGAN: On the basis of 2 attorney-client privilege and his mental 3 impressions.</p> <p>4 BY MS. D'ALLAIRD:</p> <p>5 Q. You are not going to answer based on 6 that instruction?</p> <p>7 A. Correct.</p> <p>8 Q. Nancy Wojtas, Kik's U.S. legal 9 counsel that's on this e-mail.</p> <p>10 Was she retained by Kik to advise it 11 on its offering of Kin tokens?</p> <p>12 A. I don't know.</p> <p>13 Q. You don't know?</p> <p>14 A. I have no idea what the arrangements 15 between Cooley and Kik.</p> <p>16 Q. So do you not recall why you 17 forwarded this e-mail to Ms. Wojtas?</p> <p>18 MR. CADIGAN: Objection, and again, 19 instruction not to answer.</p> <p>20 BY MS. D'ALLAIRD:</p> <p>21 Q. You are not going to answer?</p> <p>22 A. No.</p> <p>23 Q. Let's take a look at the letter on 24 the next page.</p> <p>25 For the record, Mr. McKee, if you</p>	<p>1 these things may engage securities regulation 2 and we would encourage you to consider 3 securities laws and reach out to us and we have 4 a new OSC LaunchPad project to facilitate 5 communication to give guidance in most 6 circumstances and provide flexible regulation 7 that balances investor protection with the 8 means of a nascent industry.</p> <p>9 Q. Okay. And so in addition to the 10 coverage about Kik in the press, you were also 11 writing the OSC because of this March news 12 release referred to in your letter here at 13 Exhibit 168; is that right?</p> <p>14 A. They had encouraged people to 15 approach them and it seemed to be a new 16 approach that the OSC was taking not to be 17 punning, that it would be more interactive and 18 we were interested in getting whatever 19 certainty we could get out of them.</p> <p>20 Q. I've just handed to you what we 21 previously marked if you look at the very last 22 page of this document, Exhibit No. 109. 23 Please take a look at this document 24 and let me know when you are ready for my 25 questions.</p>
<p>61</p> <p>1 turn to the second to last page, Page 5 of your 2 letter.</p> <p>3 Is that your signature that appears 4 under: "Yours very truly?"</p> <p>5 A. Yes, it is.</p> <p>6 Q. And did you write this letter?</p> <p>7 A. Yes, I did.</p> <p>8 Q. To the best of your knowledge, are 9 the statements in this letter accurate?</p> <p>10 A. To the best of my knowledge, yes, as 11 it was in July of 2017, yes.</p> <p>12 Q. If you take a look at your letter, 13 the second full paragraph on the first page of 14 the letter, last sentence in that paragraph, 15 I'm going read it into the record.</p> <p>16 "Given the OSC's March news release, 17 Kik asked us to update the OSC about Kik's 18 plans relating to Kin and to describe how Kin 19 will work."</p> <p>20 What is the March news release that 21 you are referring to there?</p> <p>22 A. That was a news release issued by 23 the Ontario Securities Commission in March of 24 2017, saying that there is lots of uncertainty 25 around these blockchain offerings and some of</p>	<p>63</p> <p>1 A. Sorry, Exhibit 109?</p> <p>2 Q. Exhibit 109. Yes, you can see on 3 the very last page of the document, there is a 4 stamp. It looks a little different than the 5 other stickers that we have been using. But 6 you'll see that this is Exhibit No. 109.</p> <p>7 A. Uh-huh.</p> <p>8 Q. So take a look at that and just let 9 me know when you are ready for my questions. 10 You can take your time.</p> <p>11 But my question is going to be: Is 12 this the March -- the OSC March news release 13 that is referred to in your letter at Exhibit 14 168?</p> <p>15 A. Yes, it is.</p> <p>16 Q. Now had you reviewed this news 17 release that we see at Exhibit 109 when it came 18 out in March of 2017?</p> <p>19 A. Yes, I had.</p> <p>20 Q. So you were aware of this news 21 release when you were first retained by Kik in 22 May of 2017?</p> <p>23 A. Yes, I was.</p> <p>24 Q. And your letter to the OSC is dated 25 July 25, 2017, correct?</p>

W. Ross McKee
12/10/2019

1 **A.** Yes, it is.
 2 **Q.** Why the -- why did you not reach out
 3 to the OSC until July of 2017, if you were
 4 aware of this news release in March of 2017?
 5 MR. HOTZ: Objection.
 6 MR. CADIGAN: I will let you answer
 7 that question.
 8 THE WITNESS: Well, first of all,
 9 the news release came out in March of 2017. I
 10 was only engaged at the very end of May, so I
 11 couldn't have reached out much sooner than
 12 that. I became -- took a while to get aware of
 13 what the project was involved and it took a
 14 while to write the letter, to make sure we had
 15 the facts accurate as well and formulate our
 16 views.
 17 BY MS. D'ALLAIRD:
 18 **Q.** Okay. So that's why it took two
 19 months to write the OSC?
 20 MR. HOTZ: Objection.
 21 MR. CADIGAN: Objection.
 22 BY MS. D'ALLAIRD:
 23 **Q.** Yes or no?
 24 MR. CADIGAN: Objection. Asked and
 25 answered.

1 today?
 2 **A.** Yes, it does.
 3 **Q.** And two sentences in in that
 4 paragraph beneath: "No. 1, presale of rights,"
 5 beginning with: "Since Kin has not yet
 6 launched."
 7 Do you see that sentence?
 8 **A.** Yes, I do.
 9 **Q.** I'm just going to read it into the
 10 record.
 11 "Since Kin has not yet launched and
 12 therefore has no effective utility at the time
 13 of the presale, this presale of rights will be
 14 conducted as a conventional securities
 15 distribution of such rights in full compliance
 16 with the securities laws of Canada, the United
 17 States and other applicable foreign
 18 jurisdictions?"
 19 Do you see that sentence?
 20 **A.** Yes, I do.
 21 **Q.** What is the sentence based on?
 22 MR. CADIGAN: Just so we -- just the
 23 source of that information.
 24 THE WITNESS: It's based on the
 25 company's advice to me that they were selling

65

67

1 You can answer.
 2 THE WITNESS: I don't think that is
 3 an accurate characterization. It took two
 4 months. The letter came about during the
 5 course of our engagement and we decided to
 6 prepare it and it took a while to prepare. I'm
 7 not sure the exact date on which we started
 8 writing this.
 9 BY MS. D'ALLAIRD:
 10 **Q.** Okay. We can move on.
 11 **A.** Want these back?
 12 **Q.** No. I would like you -- actually, I
 13 will take Exhibit 109, thank you.
 14 But stay with me on Exhibit 168. If
 15 you could please turn to Page 3 of the letter.
 16 There is a title in bold, halfway down the
 17 page, called: "The launch process."
 18 Do you see that?
 19 **A.** Yes, I do.
 20 **Q.** And then underneath that, the letter
 21 states: "Kik is moving forward in a two-phase
 22 process," and below that: "No. 1, presale of
 23 rights."
 24 The presale of rights, does that
 25 refer to the SAFTs that you mentioned earlier

1 the SAFTs in Canada to accredited investors
 2 only and that it would be in compliance with
 3 other jurisdictions. I wasn't expert on those
 4 other laws but they advised me it would be in
 5 compliance with that.
 6 BY MS. D'ALLAIRD:
 7 **Q.** I just want to be clear for the
 8 record.
 9 The portion of your sentence that
 10 states that: "The presale of rights would be
 11 conducted as a conventional securities
 12 distribution of service rights in full
 13 compliance with" -- reading ahead, "the United
 14 States," what is that based on?
 15 MR. CADIGAN: Again, asking only
 16 that you name the source and not get into the
 17 substance of legal advice.
 18 BY MS. D'ALLAIRD:
 19 **Q.** I am not asking -- just for the
 20 record, I am not asking for the substance of
 21 legal advice. I am asking for the source of
 22 that information.
 23 **A.** It would have been likely Nancy
 24 Wojtas from Cooley and Peter Heinke from Kik
 25 advising me with respect to the U.S. side of

66

68

W. Ross McKee
12/10/2019

<p>1 the offering.</p> <p>2 Q. So to your knowledge, had Kik</p> <p>3 considered U.S. securities laws in relation to</p> <p>4 Kik's offering of Kin as of the date of this</p> <p>5 letter, July 25, 2017?</p> <p>6 MR. CADIGAN: Objection. Instruct</p> <p>7 you not to answer.</p> <p>8 MS. D'ALLAIRD: Are you contending</p> <p>9 that whether or not Kik considered U.S.</p> <p>10 securities laws is privileged?</p> <p>11 MR. CADIGAN: I am asking -- to the</p> <p>12 extent that you are getting his understanding</p> <p>13 as to that, that is privileged, yes.</p> <p>14 BY MS. D'ALLAIRD:</p> <p>15 Q. Okay. You are not going to answer</p> <p>16 that question on the basis of Mr. Cadigan's</p> <p>17 instruction?</p> <p>18 A. That's right.</p> <p>19 Q. Let's turn to Page 4 of the letter</p> <p>20 of Exhibit 168. And I am looking at the</p> <p>21 heading in bold: "Securities law</p> <p>22 considerations."</p> <p>23 Underneath that, there is a</p> <p>24 sentence: "Kik has carefully considered</p> <p>25 Canadian and U.S. legal advice for the launch</p>	<p>1 not to answer.</p> <p>2 BY MS. D'ALLAIRD:</p> <p>3 Q. Are you not going to answer based on</p> <p>4 that instruction?</p> <p>5 A. Yes.</p> <p>6 Q. Generally, when you reach out to the</p> <p>7 Ontario Securities Commission -- or let me ask</p> <p>8 you this question first, back up.</p> <p>9 Had you reached out to the Ontario</p> <p>10 Securities Commission prior to this time</p> <p>11 relating to cross-border securities</p> <p>12 transactions?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And have you reached out to the</p> <p>15 Ontario Securities Commission relating to</p> <p>16 cross-border securities transactions that</p> <p>17 include the United States?</p> <p>18 A. Yes, I have.</p> <p>19 Q. When you have done that, have you</p> <p>20 referred to U.S. law in addition to Canadian</p> <p>21 law in connection with reaching out to the OSC</p> <p>22 relating to those offerings?</p> <p>23 A. Not specific U.S. laws but overall</p> <p>24 general compliance, sometimes, yes, not always.</p> <p>25 Q. When you do, why do you do that?</p>
--	--

69

71

<p>1 of Kin."</p> <p>2 And is that an accurate statement to</p> <p>3 your knowledge?</p> <p>4 A. Yes.</p> <p>5 Q. And what is the statement that:</p> <p>6 "Kik has carefully considered U.S. legal</p> <p>7 advice" based on in this letter?</p> <p>8 MR. CADIGAN: Again, just the source</p> <p>9 of that information.</p> <p>10 THE WITNESS: It's based on my</p> <p>11 understanding of --</p> <p>12 MR. CADIGAN: Actually, again, not</p> <p>13 your understanding, I am asking you for just</p> <p>14 the source of that information.</p> <p>15 THE WITNESS: Right.</p> <p>16 MR. HOTZ: Identify the source.</p> <p>17 MR. CADIGAN: And not get into</p> <p>18 communications or advice.</p> <p>19 THE WITNESS: I understand. Nancy</p> <p>20 Wojtas and Peter Heinke.</p> <p>21 BY MS. D'ALLAIRD:</p> <p>22 Q. Mr. McKee, why are you referring to</p> <p>23 U.S. law in your letter to the Ontario</p> <p>24 Securities Commission?</p> <p>25 MR. CADIGAN: Objection and instruct</p>	<p>1 MR. HOTZ: Objection. It gets into</p> <p>2 Blakes's privileges with other clients. He is</p> <p>3 not here to answer and provide answers about</p> <p>4 his work for other clients so I instruct him</p> <p>5 not to answer that.</p> <p>6 BY MS. D'ALLAIRD:</p> <p>7 Q. In your communications with the OSC</p> <p>8 relating to cross-border securities</p> <p>9 transactions in -- that involved the United</p> <p>10 States, do members of the OSC typically ask you</p> <p>11 about U.S. law?</p> <p>12 A. There is no typical.</p> <p>13 Q. Do they ever ask you about U.S. law?</p> <p>14 A. Sometimes. Especially if it's a</p> <p>15 cross-border transaction.</p> <p>16 Q. Do you have an understanding as to</p> <p>17 why the OSC has occasionally asked you about</p> <p>18 U.S. law in connection with securities</p> <p>19 offerings?</p> <p>20 MR. HOTZ: Objection.</p> <p>21 THE WITNESS: It would be --</p> <p>22 regulatory capacity for curiosity is infinite.</p> <p>23 MR. HOTZ: We have been going about</p> <p>24 an hour. Can we take a break when you have a</p> <p>25 moment.</p>
---	---

70

72

W. Ross McKee
12/10/2019

1 MS. D'ALLAIRD: Sure. I just have
2 about two more questions and then we can break
3 if that's okay.

4 BY MS. D'ALLAIRD:

5 Q. I just want to look at the bold
6 heading at the bottom of that same page, Page
7 4: "No. 2, token distribution event."

8 The token distribution event, does
9 that relate to Kik's offering of Kin to the
10 public?

11 A. Yes.

12 Q. And the second paragraph underneath
13 that heading, I want to look at the second
14 sentence in the second paragraph. I'm going to
15 read it into the record.

16 "Kin does not meet the case law
17 legal test for characterization as the
18 investment contract."

19 Mr. McKee, what case law legal test
20 for the characterization as an investment
21 contract were you referring to in this
22 sentence?

23 MR. CADIGAN: Objection. I instruct
24 you not to answer.

25 MS. D'ALLAIRD: On the basis of

1 instruction.

2 MS. D'ALLAIRD: You're going to
3 instruct him not to answer what specific case
4 law legal test he is bringing to the attention
5 of the OSC, a third party in this letter. I
6 just want to be clear, that's what you are
7 saying. That's your position.

8 MR. CADIGAN: Yes. If he brought
9 that case law to the attention of the OSC in
10 this letter, then you can obviously ask him
11 about it because you know what that case law
12 is. Otherwise, it only resides in his mind and
13 if it was something that he actually mentioned
14 to OSC, then you have that as well, but if it
15 was not, then it's entirely within his mind,
16 it's his mental impressions on this topic, it
17 goes to work product, it goes to
18 attorney-client privilege and I'm instructing
19 him not to answer.

20 Again, if you want to get what he
21 actually said, what he actually heard, that's
22 fine, but anytime you get into his motivation
23 of what he understand, his understanding of
24 case law, you are shaking your head for the
25 record, and I'm going to say that is completely

73

75

1 what?

2 MR. CADIGAN: On the basis that goes
3 directly to his mental impressions. If you
4 want to ask him about what he actually said or
5 communicated to the OSC, you can do so, but to
6 get underneath that and get to his thoughts and
7 impressions on that, I'm instructing him not to
8 answer.

9 MS. D'ALLAIRD: I am not asking him
10 for legal advice. I am asking him to explain
11 to me the meaning of a term that he included in
12 a letter for a third party to the USC. You're
13 contending that is privileged information?

14 MR. CADIGAN: Yes. I'm saying that
15 what is on the page, you can ask him about.
16 You cannot ask him his motivations, his
17 understandings, his strategy or anything else
18 that went into sending that. That is all
19 caught up in the inviolate mental impressions
20 of legal counsel. You knew that when you
21 noticed this deposition.

22 MR. HOTZ: Can I have the question
23 read back please.

24 (The record was read as requested.)

25 MR. CADIGAN: I stand by that

1 inappropriate.

2 You put on in a strict liability
3 case on U.S. law opposing -- I mean, the
4 counsel for the opposing party. There is no
5 reason for you to do so.

6 MR. MENDEL: Mr. Cadigan, I don't
7 think we need to -- you can state your position
8 about what is privileged and we can disagree
9 with that position. I don't think there is a
10 need to delve into our respective -- whatever
11 our motivations for disagreement.

12 We each have our sides that we are
13 respecting so let's just stick to assertions of
14 privilege and agreement or disagreement on
15 that.

16 MR. CADIGAN: I'd like to, but I
17 keep getting questioned about what I'm doing on
18 this, and I have been very clear from the very
19 beginning. We are here even though it's
20 completely inappropriate and more so as we go
21 on, because we were under the understanding
22 that you would be asking about statements made
23 to third parties, what he heard and what was
24 said, and we're going to it on a
25 question-by-question basis.

74

76

W. Ross McKee
12/10/2019

<p>1 We are now getting into what he was 2 thinking, what his mindset was, et cetera, and 3 we are not going to allow that. 4 You're right, though. We move on, 5 but I can't keep getting asked about my basis 6 for this and then told not to provide my basis 7 for this. We are ready to move on. I am 8 instructing him not to answer. 9 MS. D'ALLAIRD: Okay. Let's take a 10 break. 11 THE VIDEOGRAPHER: Going off the 12 record. The time is 10:27. 13 (A short recess was taken.) 14 THE VIDEOGRAPHER: Going back on the 15 record. The time is 10:50. 16 BY MS. D'ALLAIRD: 17 Q. Mr. McKee, we are back on the 18 record, and I have just a couple more questions 19 about Exhibit 168. 20 I'm looking at the last page of the 21 attached letter, Page 5, and looking at the 22 last sentence of that last paragraph. You ask 23 Ms. Chaukos to get back to you as soon as she 24 could. 25 Why were you asking her to do that?</p>	<p>1 she got back, and subsequent to that, we -- I 2 followed up with her and suggested a meeting 3 then. 4 Q. With Ms. Chaukos? 5 A. Yes. Well, with the OSC LaunchPad 6 team, yeah. 7 Q. And so Ms. Chaukos, you followed up 8 with Ms. Chaukos after hearing from Amy Tsai or 9 did Ms. Chaukos then reach out to you? 10 A. I don't remember who called whom. 11 Q. And what is the next thing you 12 remember after having communication with Ms. 13 Chaukos? 14 A. We had a meeting with the OSC staff. 15 There was nothing substantive between this and 16 that meeting. 17 Q. And the meeting with OSC staff, when 18 did that take place? 19 A. August 14, 2017. 20 Q. August 14, 2017? 21 A. Yes. 22 Q. Was that an in-person meeting? 23 A. Yes, it was. 24 Q. Where did it take place? 25 A. At the Ontario Securities</p>
<p>77</p>	<p>79</p>

1 A. All right. It says: "If you do
 2 have any issues you wish to raise, we would
 3 appreciate you getting back to me as soon as
 4 you can."
 5 Q. Fair enough. Why were you asking
 6 her to do that?
 7 A. So we could try to achieve
 8 regulatory certainty.
 9 Q. What do you mean by "regulatory
 10 certainty?"
 11 A. Get assurance from the OSC that they
 12 agreed with our positions set out in the
 13 letter.
 14 Q. That position is that Kin was not --
 15 the offering of Kin was not an offering of
 16 securities under Canadian law?
 17 A. Right.
 18 Q. And after you sent this letter to
 19 Ms. Chaukos, did anyone from the OSC reach out
 20 to you regarding this letter?
 21 A. Yes. Initially, Amy Tsai, who I see
 22 I gave the wrong name in here. Amy Tan. It's
 23 not a different person, that's just a typo.
 24 Contacting me saying Pat was actually away on
 25 vacation and would get back to us as soon as

1 Commission.
 2 Q. In Toronto?
 3 A. Right.
 4 Q. And who was present at that meeting?
 5 A. There was myself representing
 6 Blakes. There was Ted Livingston, Peter
 7 Heinke, Tanner Philp from Kik. There was -- by
 8 conference call, Nancy Wojtas and Karen Ubell
 9 from Cooley. From the OSC was Pat Chaukos,
 10 Jonathan Yeung, Asad Aktar, and I can't
 11 remember who else from the OSC.
 12 Q. Okay. You mentioned Mr. Livingston.
 13 Is that the CEO of Kik?
 14 A. Yes.
 15 Q. Anyone else attend other than those
 16 attendees from Kik, yourself, the OSC and then
 17 Kik's U.S. counsel on the phone?
 18 A. I don't know -- no. No one else.
 19 Q. Did you communicate to the OSC why
 20 Kik's U.S. counsel would be attending on the
 21 phone?
 22 A. I don't think so, no.
 23 Q. Did the OSC request that Kik's U.S.
 24 counsel join this meeting?
 25 A. No.

W. Ross McKee
12/10/2019

<p>1 Q. Why did you -- Kik's U.S. counsel 2 join this meeting? 3 MR. CADIGAN: Objection. Instruct 4 you not to answer. 5 MS. D'ALLAIRD: On the basis of 6 privilege? 7 MR. CADIGAN: On the basis of 8 privilege and work product. 9 BY MS. D'ALLAIRD: 10 Q. Are you not going to answer based on 11 that instruction, Mr. McKee? 12 A. That's right. 13 Q. How long was this meeting? 14 A. To my recollection, it was about an 15 hour. 16 Q. And did you take notes during this 17 meeting? 18 A. I took some notes. I did talking 19 and I'm not a very good note taker while talker 20 but I did take some notes, yes. 21 Q. Did anyone else take notes at the 22 meeting? 23 A. I don't know. I presume so. People 24 were writing, so probably, I'm not sure. 25 Q. Did you review anyone's notes after</p>	<p>1 to end as best as you can recall. 2 A. Okay. 3 Q. So who spoke first? 4 A. I probably spoke first, just to 5 introduce who was who on our side of the table. 6 The OSC staff would have introduced, not would 7 have, the OSC staff did introduce themselves as 8 well initially, so who the parties were. 9 I gave a very general background 10 about the fact that this offering was pending 11 as per the letter and then Ted Livingston 12 spoke. There was no PowerPoint presentation, 13 it was all just verbal. He spoke about the 14 background of Kik, what the Kik chat app was, 15 its business role and its place in the Canadian 16 business community as a messaging app. 17 The challenges they faced in an ad 18 revenue-based environment, that Facebook and 19 Google were making their money from ads and 20 giving everything else away for free and this 21 made it difficult for Kik to provide services 22 in the way of making the revenue that they 23 would do and so they were looking -- they had 24 trialed some loyalty points concept in previous 25 time period. I'm not sure the exact time</p>
<p>81</p>	<p>83</p>

1 the meeting?
2 **A.** No.
3 **Q.** Okay. What was the purpose of this
4 meeting?
5 **A.** It was to provide an opportunity for
6 the OSC to ask questions. I now recall Ms.
7 Chaukos had sent an e-mail saying -- a thanks
8 letter; we have some questions about the Kin
9 offering so we were going to go and provide
10 more information to the OSC's questions to
11 address them. We wanted to approach it in a
12 very open way. We weren't trying to hide
13 anything. We wanted to say here is everything
14 we are doing. Here is our analysis, are you
15 cool with this.
16 **Q.** Did Ms. Chaukos give you any other
17 specific indication of what she wanted to
18 discuss other than just generally the offering
19 of Kin?
20 **A.** No. I invited her a couple of times
21 to provide us -- if you give us answers to our
22 questions ahead of time, we could prepare
23 specifically and there was no response.
24 **Q.** As best as you can, I would like you
25 to walk me through this meeting from beginning

1 period. I wasn't -- I don't have -- I never
2 used the Kik app so I don't know how it works
3 in detail.
4 And so they proved the concept that
5 their users of their community were interested
6 in doing things that would allow them to earn
7 these Kin points and earn them and spend them,
8 and so they said it was a -- as a trial for a
9 form of ecosystem, something that the users
10 were interested in.
11 The growth of cryptocurrency and
12 that technology had given them the idea that
13 they would be able to do this in a way that
14 would have actual value as opposed to -- the
15 Kins transferred would have actual value in an
16 ecosystem as opposed to just loyalty points, so
17 that, for example, people could buy, if you
18 like something today on Facebook, you don't get
19 anything for that. You like it and that's
20 nice. Facebook earns that information and
21 sells that information.
22 Under the proposal with Kin, if you
23 participated in things and you liked things and
24 you did surveys, you would earn Kin tokens and
25 then you could spend those Kin tokens for

W. Ross McKee
12/10/2019

1 things like, for example, getting access,
2 special access to a particular chat group with,
3 you know, Selena Gomez or something. So they
4 sort of said the background of all that.

5 Then we talked about the plan for
6 the particular Kin offering, that there was
7 underway, at that time, the SAFT offering that
8 had been offered looking to raise around \$50
9 million for institutional investors and there
10 was a global SAFT offering, and we discussed
11 that it would be conducted on the basis in
12 Canada, selling only to accredited investors,
13 and then that there would be a second phase of
14 the actual Kin offering that would be offered
15 later in September.

16 Once the -- the idea was that the
17 SAFT offering was now, while they were still
18 working on the Kin platform, at the time when
19 the Kin wallet was up and integrated with Kik
20 accounts and they were ready to actually have
21 the Kin network integrated with the Kik
22 network, they would be able to launch the Kin
23 token offering at that time.

24 This is a distinguishing point from
25 other ones where it was just -- as I said in my

1 me, the description of the offering and what
2 would happen with the Kin, who was speaking at
3 that time? Who was giving this information?

4 **A.** The information with the rollout and
5 the timing, that would have been either Ted
6 Livingston or Tanner Philp, but the mechanisms
7 of rollout and scaling concerns.

8 **Q.** Okay.

9 **A.** And a good way -- once they finished
10 describing the system, then, you know, I took
11 over and said here is our -- we think this is
12 fine from a securities viewpoint. We drew a
13 distinction from other ICOs where there was no
14 vaporware. This is an existing platform
15 rolling onto it directly, it would be
16 operational from Day 1 and we discussed the
17 leading case. It was Pacific Coast Coin
18 Exchange.

19 Canada is the leading authority on
20 what is an investment contract, and I pointed
21 in particular to the facts of Pacific Coast
22 Coin Exchange is about people buying bags of
23 silver coins and they can buy them one of two
24 ways, they can buy them either on margin
25 contracts or they could buy them in specie,

85

87

1 letter, vaporware, things were -- actually
2 didn't exist. Kik -- it was emphasized that
3 Kik had a platform of like 15,000 users, I
4 mean, 15 million users, I'm not sure the
5 numbers that were used, but they had an
6 established platform of users, all of whom
7 would be able to eventually participate.

8 It would be rolled out over time
9 primarily for scaling concerns. There was
10 concern whether blockchain technology could
11 handle the numbers involved, whether a theorem
12 which was the original technology could handle
13 the numbers that Kik would bring, it would be
14 by far the largest, you know, new entrant in
15 terms of existing users.

16 And so they thought they would trial
17 it with a small number of users first of all to
18 make sure it worked smoothly and then as
19 scaling would go, they would gradually scale it
20 out and over, making sure the network didn't
21 crash on Day 1 essentially.

22 Then we discussed the --

23 **Q.** Let me just stop you there.

24 **A.** Okay.

25 **Q.** What you were just describing for

1 like you buy a bag of coins and you pay for
2 them upfront. The vast majority -- in that
3 case, the vast majority of purchasers bought
4 them on margin.

5 The case law and the decision is
6 about only the margin contracts, not about
7 people who bought them in specie, and the Chief
8 Justice of Canada in that case said the
9 securities law is not affected by people who
10 are buying coins in specie.

11 And the leader, he was in dissent in
12 that particular case. The head of the group of
13 the majority also said we are talking here only
14 about the margin contract issues here, because
15 in their case, it was the hedge contract that
16 the company was running, that was the actions
17 of others that was necessary as one of the
18 pillars of an investment contract, and if the
19 company did not manage their hedge contract,
20 there would be no funds with which they could
21 repay people if their profits they had
22 allegedly earned on their margin contracts
23 whereas people who just made profits based
24 solely on the market price of silver, because
25 it is held in specie, that did not inform the

86

88

W. Ross McKee
12/10/2019

<p>1 case here and it wasn't part of the Securities 2 Act.</p> <p>3 So the distinction I was pointing to 4 the OSC was -- in this case, the people are not 5 buying Kin on margin. They're going to buy Kin 6 and there is no profit coming from the company, 7 there is no return coming from Kik. They don't 8 earn, you know, dividends, they don't earn 9 profits. They have no way of -- if they're 10 going to make any profit at all, it's going to 11 be in the fact that their Kin which they own is 12 going to increase in price or change in price 13 in the market for Kin, which was directly the 14 same as if they had a bag of silver coins and 15 that which the Supreme Court had said, that is 16 not an investment contract. So that was 17 central to our analysis and it is a point that 18 is frankly overlooked, so we were drawing that 19 to the OSC attention.</p> <p>20 And then the other aspect of the 21 decentralized nature of Kin isn't writing apps. 22 There's app providers involved, so and so, 23 elements of things that are part of investment 24 contract. It is not a good deck. It's not a 25 -- they don't have royalty rates, or the other</p>	<p>1 Q. Pacific Coast Coin Exchange. Okay. 2 Thank you, I always mix it up. 3 And so is that a test of -- I'm 4 sorry. Let me back up. 5 Is Pacific Coast Coin a case out of 6 the Canadian Supreme Court relating to the 7 definition of investment contract under 8 Canadian law?</p> <p>9 A. Ontario law.</p> <p>10 Q. Under Ontario law.</p> <p>11 A. Ontario securities law, yes.</p> <p>12 Q. You mentioned that in going through 13 your analysis of that case in relation to the 14 offering of Kin, you mentioned -- stating that 15 profits off of Kin would not come from the 16 company.</p> <p>17 Why -- why were you describing that 18 in relation to Pacific Coast Coin?</p> <p>19 MR. CADIGAN: Objection. Instruct 20 you not to answer.</p> <p>21 If you want to ask what he said in 22 the meeting about that, that's fine.</p> <p>23 MS. D'ALLAIRD: Are you objecting on 24 the basis of privilege?</p> <p>25 MR. CADIGAN: Yes.</p>
<p>89</p> <p>1 major categories of the definition of security, 2 we went through those briefly and said, look, 3 it's not this, it's not that, because they 4 don't have any entitlement earnings, there is 5 no profit sharing, et cetera, et cetera.</p> <p>6 And then the last thing we talked 7 about --</p> <p>8 Q. Let me just stop you right there, 9 just with a couple quick questions before I 10 forget.</p> <p>11 A. Sure.</p> <p>12 Q. So you mentioned that you -- in the 13 beginning of this next piece of the meeting, 14 where you described that this was an existing 15 platform that would be operational on Day 1, 16 where had you received that information to 17 present to the OSC? Who had given you that 18 information?</p> <p>19 A. From Kik.</p> <p>20 Q. From Kik. Okay. And Pacific Coast 21 Coin, that's a case law out of the Supreme 22 Court of Canada?</p> <p>23 A. Yes.</p> <p>24 Q. And is it --</p> <p>25 A. Pacific Coast Coin Exchange.</p>	<p>91</p> <p>1 MS. D'ALLAIRD: Just to be clear for 2 the record.</p> <p>3 BY MS. D'ALLAIRD:</p> <p>4 Q. You are not going to answer that 5 based on Kik's counsel's instruction?</p> <p>6 A. Yes.</p> <p>7 Q. What are the -- under Pacific Coast 8 Coin, can you set out for me what that case 9 holds? How one decides if something is an 10 investment contract under Pacific Coast Coin.</p> <p>11 A. Sure. There are essentially four 12 prongs to the test. It is an investment of 13 money with an expectation of profit to come 14 primarily from the efforts of others, and I 15 forget the -- I think I blurred two of those 16 together so that is basically it -- in the 17 common enterprise, sorry.</p> <p>18 Investment of money in a common 19 enterprise with an expectation of profit 20 primarily to come from the efforts of others, 21 and it's primarily, because they said it's not 22 necessarily solely, it's primarily.</p> <p>23 Q. And if I understand you correctly, 24 you discussed or presented to the OSC on the 25 prong under Pacific Coast Coin of expectation</p>

W. Ross McKee
12/10/2019

<p>1 of profits; is that right? 2 A. Yes. 3 Q. And can you state for me again what 4 you said with respect to that prong? 5 A. If there was an expectation of 6 profit, the profit to a holder of Kin tokens 7 would come only from an appreciation of price 8 of the tokens which they held and then the 9 eventual sale of that token for more than you 10 bought it for, and it would not come from 11 earnings from Kik Interactive. 12 Q. Did you also discuss with the OSC 13 the prong under Pacific Coast Coin of common 14 enterprise? 15 A. Yes, I believe so, yes. 16 Q. What did you say about that prong to 17 the OSC in this meeting? 18 A. I don't recall specifically because 19 that wasn't a major part of that, but in a 20 sense, that the Kin ecosystem as it was devised 21 would have a number of applications, a number 22 of users, it wasn't -- people were not dealing 23 directly exclusively with Kik Interactive. It 24 would be other participants in the Kin. People 25 -- what people chose to allow people to do to</p>	<p>1 would have mentioned. 2 Q. After you discussed Pacific Coast 3 Coin with the OSC, can you keep walking me 4 through this meeting, what happened after that? 5 A. We talked about the registration 6 side and Canada registration means dealer or 7 advisor registration, not qualification by 8 prospectus, and they said just in case you are 9 curious, our analysis on the registration side 10 is that -- there is a national instrument in 11 Canada, it's a rule called National Instrument 12 31013 which has a long complicated name but 13 basic registration requirements and there is a 14 companion policy, 3103 CP which is the 15 equivalent of -- rough equivalent of an SEC 16 interpretive release so it publishes -- it's a 17 formal policy published by the Securities 18 Commission. 19 In this case, it is published 20 uniformly by all the Securities Commission in 21 Canada which is why it's called a national 22 instrument and a national companion policy, and 23 in the companion policy, they give their 24 interpretation of how they intend to apply and 25 interpret the law, and in their triggers for</p>
<p>93</p> <p>1 earn or spend Kin would not be up to Kik. It 2 would be up to the ecosystem, the users of 3 that, so that's it. 4 Q. And then did you also discuss with 5 the OSC the prong of efforts of others under 6 Pacific Coast Coin? 7 A. Yes. 8 Q. What did you say about that prong? 9 A. I said in this case, the profits 10 would come from the secondary market generally 11 and that, you know, the price of a commodity 12 like a Kin token in the market would be the 13 market price which is what everyone's view is 14 on the value of that Kin. It is not fixed by 15 Kik. It is not set by Kik in any way. It's a 16 market price and so the value of potential 17 profit is if people generally think it is worth 18 something or not. 19 Q. So other than what you described 20 just now about what you said about the prongs 21 of the Pacific Coast Coin test, did you say 22 anything else about Pacific Coast Coin to the 23 OSC? 24 A. I can't recall specifics of anything 25 else. I just said those are the key things I</p>	<p>95</p> <p>1 dealer registration, they discuss issuers and 2 they said that an issuer who is raising capital 3 for their -- or if an issuer is raising capital 4 for their business in accordance with the 5 business plan, and they do this even on success 6 of an asset, but it's just raising capital for 7 a business plan. They would not interpret that 8 as being in the business of creating securities 9 in those circumstances unless the issuer has 10 specific people who are devoted to nothing but 11 raising money for the issuer. 12 And so that certainly can be said, 13 this was equivalent to Kin to the extent 14 they're selling these SAFT tokens and redoing 15 this raise, it's in accordance with their 16 business plan and if they have another 17 business, are you running a chat message app, 18 so they're not in the business of trading 19 securities and therefore, they don't need to be 20 registered as a dealer. 21 Q. If I understand you correctly, and 22 I'm not a Canadian lawyer so I just want to 23 understand this. 24 A. I share your opinion. 25 Q. With respect to the registration</p>

W. Ross McKee
12/10/2019

<p>1 piece of that, your conversation on that, was 2 that only with respect to the SAFTs or did that 3 include also -- 4 A. No, just in general, basically. 5 Q. General, including the whole SAFTs 6 and then the direct sale? 7 A. The sale of these tokens was 8 pursuant to a business plan in connection with 9 this business that they had for establishing 10 the Kin ecosystem and so it was not -- they 11 were not in a securities trading business like 12 a broker would be. 13 Q. And so if I understand you 14 correctly, this -- what you are describing is 15 essentially an exemption from registration? 16 A. Not an exemption, no. It's not a 17 trigger. This discussion is whether the 18 registration requirement has been triggered or 19 not, so it's not that it's has been triggered 20 and you're exempt, like the accredited investor 21 one is different and we're dealing with 22 different things here. 23 So what we were saying here was, if 24 there is no trigger for dealer registration in 25 these facts -- situations, and in the SAFT, we</p>	<p>1 A. On the same basis that the money 2 that's being raised is to fulfill the business 3 plan that they have for the development of this 4 business, and therefore, it's not in the 5 business of trading securities. 6 It's a -- the companion policy talks 7 about startups, and they say in a startup 8 situation, you know, they can be raising money 9 for that, and even if you go back successively, 10 then you are not engaged in the business of 11 trading securities which is the trigger for 12 dealer registration. 13 Q. So to my understanding, the trigger 14 would have been if the Kin -- if the sale of 15 Kin was a security sale; is that right? 16 A. No, that's not accurate. Even if 17 you are selling securities -- so, for example, 18 and this is not part of my advice to the OSC, 19 right, but briefly, just for understanding, 20 people who -- two guys in a garage have come up 21 with this cool idea for a new computer. They 22 decide to sell shares in a company to raise 23 money for this, to raise the computer, to raise 24 money to build the computer, they sell these 25 shares to people.</p>
<p>97</p> <p>1 are saying prospectus requirement is triggered 2 but there is an exemption and in the case of 3 the sale of the tokens, we are saying that the 4 prospectus requirement is not triggered. 5 Q. So if I understand you correctly, 6 the -- you were saying that in the SAFT -- with 7 respect to the SAFTs, registration was not 8 triggered because of -- because of what? 9 A. Because they were raising the money 10 in the SAFT to pursue their business plan, not 11 for the purpose of being in the business of 12 trading securities. 13 Q. But the SAFTs, if I understand you 14 correctly, were securities or considered to be 15 securities for purposes of this discussion with 16 the OSC? 17 A. Yes. 18 Q. And then with respect to the 19 offering of the Kin tokens themselves, what was 20 the argument there as to why it shouldn't be 21 registered? 22 A. Registered as a dealer you mean or 23 are you talking about U.S. DAO registration? 24 Q. Registered -- let's take both 25 registered as a dealer.</p>	<p>99</p> <p>1 Prospectus requirements aside, 2 because they are raising the money to build up 3 their business dealings in the computer 4 business, they are not in the business of 5 trading securities, so they do not have to 6 register as a dealer in order to be able to 7 sell those shares to other people. 8 The requirement, it's all in the 9 context of whether or not you are selling 10 securities, so if you are not doing securities 11 at all, dealer registration doesn't come into 12 it at all. I understand that. But we were 13 talking about both the SAFT and saying, look, 14 and for greater certainty, even if you are 15 concerned about dealer situations, it would not 16 be a dealer registration issue anyway, because 17 they are not involved in some huger policy in 18 saying so. 19 Q. Thank you. That's what I was trying 20 to clarify. 21 So my understanding then is that for 22 purposes of the discussion of dealer 23 registration with the OSC during this meeting 24 in August of 2017, the assumption -- just for 25 the purposes of that part of the discussion,</p>

W. Ross McKee
12/10/2019

<p>1 was that the offering of Kin was a security? 2 A. No. I wouldn't say it's an 3 assumption. What I said was, the SAFT was an 4 offering of securities so if they are curious 5 about that, what we were seeking to do in the 6 meeting was to assuage any regulatory concerns 7 the OSC might conceivably have, any. 8 There were people there from the 9 registration branch who focus on dealer stuff. 10 They don't care about prospectus exemptions and 11 so on, so we were saying in case you are 12 thinking whether Kik should register as a 13 dealer, they don't have to because they're not 14 -- whether what they are offering is a security 15 or not, they don't have to register as a dealer 16 because they are not in the business of trading 17 in securities. 18 It wasn't intended as a concession 19 or even an assumption that it was a security. 20 In the case of a public offering, we had our -- 21 we said that in the letter that we were 22 treating the SAFT offering as a distribution of 23 securities, so a registration question would 24 legitimately arise for that and we would 25 address that.</p>	<p>1 We appreciate. We were hoping we might get 2 them saying, yeah, you're right, this is great, 3 you know, carry on. But nothing was said. 4 That's all very well. They picked up their 5 notes and said, we will think about all the 6 things you've told us, thanks for your time, 7 and the meeting is over. 8 Q. After you spoke and then folks from 9 Kik and then maybe you spoke again, the OSC 10 didn't say anything substantive? 11 A. No. It was an interactive meeting 12 throughout. There were comments and discussion 13 along, there were questions in forming it. I 14 think the -- I said, so what do you think and 15 are we there, and the closest we got was Pat 16 Chaukos said, I don't think we are where you 17 are yet. 18 Q. And that was in the context of what? 19 A. Of me asking, are you agreeing with 20 our position that we don't have a security 21 offering here. 22 Q. Did Pat Chaukos say anything else 23 during this meeting? 24 A. She asked questions about some of 25 the things, what about the development of the</p>
<p>101</p> <p>1 The Kin one, we said we don't think 2 it's an offering of securities at all, because 3 of this, but -- just for purposes in case you 4 are concerned, even if it -- whether it is or 5 not, there is no registration here. 6 Q. Okay. I think I understand you. So 7 for purposes of the registration with respect 8 to the offering of the Kin tokens, whether or 9 not it was a security or not, it didn't have to 10 be registered. 11 A. The company did not have to register 12 as a dealer, that's right. 13 Q. Any other registration that could 14 apply? 15 A. Advisor, investment fund manager, 16 those don't apply. Advisors or portfolio 17 manager's discretion also are not applicable. 18 This is not an investment fund so there is no 19 investment fund manager issue, so no. 20 Q. So no discussion of that during the 21 meeting? 22 A. No. 23 Q. Then what happened next in the 24 meeting? Who spoke next? 25 A. They sort of said thanks very much.</p>	<p>103</p> <p>1 Kin network by Kik, and we responded, 2 explaining the distinction between Kik and the 3 developers who are not Kik people, they are 4 third parties. 5 She asked questions about confirming 6 that there was no profit sharing, there was no 7 revenue -- revenue rights arising, no voting 8 rights arising with the Kin tokens. We 9 confirmed that was the case. She talked, you 10 know, we talked about some of the origins. I 11 think the word Howey was mentioned. I can't 12 remember exactly by whom in that, and -- but I 13 do recall she was actually somewhat dismissive 14 of Howey as a precedent as being old law and 15 we're dealing with new modern things. So, you 16 know, we just focused primarily on Pacific 17 Coast Coin Exchange which was trading. 18 Q. And you don't recall who first 19 raised Howey? 20 A. I honestly don't recall, no. 21 Q. But you do recall it being 22 discussed? 23 A. Yeah, I recall Howey was mentioned. 24 I recall her saying that it was old law and she 25 was dismissive of it.</p>

W. Ross McKee
12/10/2019

1 **Q.** So all you recall about the
2 discussion with respect to Howey is that
3 someone raised it. Was it raised by the OSC?
4 **A.** I can't remember.
5 **Q.** Can't remember. Someone raised it
6 and Ms. Chaukos said that it was an old test?
7 **A.** Yeah. She said it was an old law
8 from the 1940s and we are dealing with modern
9 things and so we should be bringing modern
10 concepts to review these things in general. I
11 mean, they talk about how they are flexible and
12 they're looking to adapt to the modern business
13 needs and so on.
14 **Q.** Did she express a view on Pacific
15 Coast Coin and if that should apply to the
16 offering of Kin?
17 **A.** I don't think she expressed a view,
18 no.
19 **Q.** Anything else discussed of Howey in
20 the meeting?
21 **A.** They said -- about Howey?
22 **Q.** Uh-huh.
23 **A.** I don't recall anything further
24 about Howey, no.
25 The only thing they said is that

1 some, we are working through some and so on,
2 but there had been no exemption orders granted
3 to date. That there were no decisions of any
4 securities commissions.
5 There was a notice from the Ontario
6 Securities Commission and the Quebec Autorite
7 des Marches Financieres, AMF, in 2014, saying
8 bitcoin is not regulated so be cautious.
9 There was the press release in March saying
10 these digital assets of cryptocurrencies may
11 involve securities law, you should consult and
12 you should consider securities law, and that
13 was it.
14 And so we talked about the fact that
15 there was no guidance and therefore, our
16 interpretation was this based on the situation,
17 the response was that the U.S. has the DAO, we
18 have nothing like that yet. They said ours is
19 coming soon. We're looking forward to that.
20 **Q.** When you talked about the fact that
21 there was no guidance, who said that there was
22 no guidance?
23 **A.** I would have said that probably
24 three or four times.
25 **Q.** Did anyone at the OSC agree or

105

107

1 they were planning on releasing guidance very
2 soon. There was brief mention of the fact that
3 the SEC had published its DAO report earlier in
4 July, and we didn't get into it in detail but
5 they said, you know, Canada is planning on
6 publishing guidance and looking through the
7 CSA. CSA is Canadian Securities
8 Administrators. It's the body of all the
9 provincial and territorial regulators together,
10 and that the staff would say they would be --
11 that would be very helpful to us to provide
12 more information about that, so we should watch
13 for that.
14 **Q.** Who brought up the approaching
15 guidance coming from the CSA?
16 **A.** Pat Chaukos.
17 **Q.** Pat Chaukos.
18 And you said that someone brought up
19 the DAO report.
20 **A.** Yeah, it was mentioned that there
21 was -- I said, look in -- there was, I mean,
22 zero guidance in Canada at this point on
23 cryptocurrency, digital things, there was like
24 nothing at all. There were no exemption
25 orders. They said, you know, we are looking at

1 disagree with that?
2 **A.** I think they generally acknowledged
3 that there had been no published guidance and
4 that we -- that's why they were working on this
5 guidance and they were looking forward to
6 releasing it and they were quite excited about
7 it.
8 **Q.** You said they acknowledged -- who
9 acknowledged that there was no formal guidance?
10 **A.** I think Pat and they all kind of
11 nodded together, but yeah -- we all did.
12 **Q.** She said there is no formal
13 guidance.
14 **A.** She wouldn't have -- I'm not sure
15 her specific words, specifically, but --
16 **Q.** Did she give any --
17 **A.** -- there was a general
18 acknowledgement there was no guidance, which is
19 why they were going to be publishing guidance.
20 **Q.** Did Ms. Chaukos say anything about
21 the upcoming guidance, the substance of --
22 **A.** No.
23 **Q.** -- the upcoming formal guidance?
24 No?
25 **A.** No, she did not.

106

108

W. Ross McKee
12/10/2019

1 MR. CADIGAN: Just for the record,
2 can you just let her finish the questions.
3 THE WITNESS: Sorry. I'm jumping
4 in.
5 BY MS. D'ALLAIRD:
6 Q. With respect to the DAO report, walk
7 me through what was discussed about the DAO
8 report that came out of the SEC?
9 A. To my recollection, it was just
10 mentioned in passing. We did not walk through
11 the DAO report. We didn't go through it in any
12 particular detail as to what it said.
13 It may have been -- briefly, by way
14 of comparison saying, you know, Kin is nothing
15 like the DAO in the sense that it's -- the DAO
16 is like a hedge fund where people would earn --
17 have rights to returns and so on and this was
18 nothing like that, so it may have been briefly
19 mentioned for facts by way of distinction,
20 but we didn't get into any detailed analysis.
21 Q. When you say, "briefly mentioned for
22 facts," that was brought up on Kik side?
23 A. Yes. By Kik side.
24 Q. By you specifically?
25 A. Yes.

109

1 Q. I just want to understand if you
2 remember specifically what she said.
3 A. I don't recall specifically --
4 Q. You don't recall.
5 A. -- her words, but it was -- her --
6 my recollection of her tone was that she was
7 dismissive in tone and words of substance about
8 the importance of -- the central importance of
9 the Howey case.
10 Q. Do you remember anything specific
11 that she said?
12 A. No.
13 MR. CADIGAN: Again, can we just --
14 both of you actually --
15 THE WITNESS: Sorry. Yeah, talking
16 over, sorry. Yep, yep.
17 BY MS. D'ALLAIRD:
18 Q. I think you testified earlier that
19 Ms. Chaukos said something along the lines of,
20 I'm not sure that we are at where you're at.
21 A. Yes.
22 Q. That was with respect to Kik's
23 position that the offering of Kin was not a
24 securities offering?
25 A. Correct.

111

1 Q. I want to go back to the discussion
2 of Howey and what you can remember about that,
3 and you said that Ms. Chaukos said something
4 along the lines -- that Ms. Chaukos said that
5 the test, the Howey test was an old test.
6 And did she give you -- did she make
7 any kind of comparison between Howey and
8 Pacific Coast Coin?
9 A. No, I don't think so. At the time I
10 wasn't even sure she was a lawyer so...
11 Q. You were not sure if Ms. Chaukos was
12 a lawyer?
13 A. Yes, I wasn't that familiar with her
14 professional background.
15 Q. What was your understanding --
16 sorry. Hang on a second.
17 So generally, is your testimony that
18 Ms. Chaukos was dismissive of the Howey test?
19 A. She said that the Howey test was --
20 the Howey case was old law.
21 Q. Is that exactly what she said?
22 A. To the best of my recollection, it
23 was definitely old and, you know, I think the
24 implication was that it therefore didn't have
-- had limited precedential value.

110

1 Q. Did she give any reasons for -- for
2 what she said for her position that she didn't
3 necessarily agree with Kik's position?
4 A. No. She gave no reasons, no
5 feedback.
6 Q. Did anyone ask her for her reasoning
7 of that position?
8 A. Not expressly, no. We were looking
9 for their view and that was -- clearly, they
10 were going to go away and think about it, so it
11 had been conveyed to us that they weren't
12 prepared to tell us anything that day. They
13 wanted to go away and think about it. So we
14 let them go away to think about it. We can't
15 force -- force a regulator. It's like trying
16 to push rope.
17 Q. Did Kik's U.S. counsel speak at this
18 meeting?
19 A. She may have chimed in on the
20 conference call a couple of times. I don't
21 recall any specific part of the conversation
22 that she had.
23 Q. When you say, "she," are you
24 referring to Nancy Wojtas?
25 A. Nancy Wojtas, that's right, yes.

112

W. Ross McKee
12/10/2019

<p>1 Q. And I think you said Karen Ubell was 2 also present? 3 A. Yes. 4 Q. To your knowledge, were they on the 5 phone during the entire meeting? 6 A. The link was open. If they were in 7 the room, I have no idea. They could have got 8 up and walked out. 9 Q. At what point did they speak during 10 the meeting? 11 A. I can't recall any specific 12 interventions. 13 Q. Was it during the beginning, the 14 middle, end? Do you recall how many times they 15 spoke? 16 A. I don't recall. 17 Q. Do you recall anything that Kik's 18 U.S. counsel said during this meeting? 19 A. No. I'm not sure they did intervene 20 at any point. If they were on the call, it may 21 have been listening only -- there is nothing in 22 my recollection or my notes that shows they 23 said anything. 24 Q. During the portion of the meeting 25 where you were discussing with Ms. Chaukos the</p>	<p>1 Commission during this meeting? 2 A. No. 3 Q. To your knowledge, did anyone, 4 either yourself or Kik's U.S. counsel or Kik 5 itself, ever reach out to the U.S. Securities 6 and Exchange Commission in relation to Kik's 7 offering of Kin? 8 MR. CADIGAN: Objection. 9 Foundation. 10 You may answer. 11 THE WITNESS: I can answer it? I 12 don't have any knowledge of that. I don't have 13 any knowledge as to whether they did or did not 14 either way. 15 BY MS. D'ALLAIRD: 16 Q. Is it fair to say that at least one 17 of the purposes of this meeting was to discuss 18 with the OSC their views on whether Kik's 19 offering of Kin was an investment contract 20 under Canadian law? 21 A. Yes, that's fair. 22 Q. How did the meeting conclude? 23 A. Pretty much we will get back to you. 24 Q. We will get back to you. That was 25 stated?</p>
<p>113</p>	<p>115</p>

1 Howey test, did Kik's U.S. counsel say anything
 2 at that time?
 3 **A.** As I said, I have no recollection of
 4 U.S. counsel saying anything during the call,
 5 early, late, during.
 6 **Q.** You have no reason to believe that
 7 they were not on the call during that portion
 8 of the conversation?
 9 **A.** Correct. I have no reason to
 10 believe they would not have been on the call.
 11 **Q.** Did anyone during this meeting
 12 express a view as to whether the offering of
 13 Kin was a securities offering under U.S. law?
 14 **A.** No.
 15 **Q.** Did the OSC ever express a view --
 16 **A.** No.
 17 **Q.** -- under U.S. law?
 18 **A.** No. Sorry.
 19 **Q.** Did anyone on any side during this
 20 meeting in August of 2017, bring up potentially
 21 -- Kik potentially reaching out to the U.S.
 22 Securities and Exchange Commission?
 23 **A.** No.
 24 **Q.** Other than the DAO report, was there
 25 any mention of the U.S. Securities and Exchange

1 **A.** The OSC will get back to us, thank
 2 you very much for your time, they will take it,
 3 consider it, and we can expect to hear from
 4 them.
 5 **Q.** And what specifically were they
 6 going to get back to you on, did they say?
 7 **A.** Our submissions, whether they agreed
 8 with them or if they had views of what we ought
 9 to be doing instead.
 10 **Q.** The submissions you're referring to,
 11 that was your submission that the offering of
 12 Kin was not a securities offering under
 13 Canadian law, right?
 14 **A.** Yes.
 15 **Q.** And if it was, it was exempt from
 16 registration.
 17 **A.** Just again, registration, make sure,
 18 translate registration. If it was, there was
 19 no dealer registration requirement for the
 20 offering for Kik in respect of either the SAFT
 21 offering or the Kin offering. We were not --
 22 frankly, that wasn't really a question at
 23 issue, because they have a published policy
 24 statement where they've given guidance, very
 25 clear, saying, startup issuers can raise money

W. Ross McKee
12/10/2019

1 on their own as long as they have real business
2 that they are doing a business plan. And
3 that's not a-- and they have a broad exemption
4 for issuers.

5 Issuers don't have to register
6 themselves as dealers to sell their own shares,
7 so long as they are raising money for their
8 business. And that was clear. We were just
9 like checking off that box so we weren't really
10 waiting for feedback. The feedback was almost
11 exclusively around the Kin offering.

12 Q. Whether it was a securities
13 offering?

14 A. Prospectus -- whether it was a
15 prospectus requirement, yeah.

16 Q. Whether it was a prospectus
17 requirement under Canadian law?

18 A. Right, right.

19 Q. Let me ask you this during that
20 meeting.

21 During the August 2017 meeting with
22 the OSC, was there any discussion about Kik
23 potentially not offering Kin in Canada?

24 A. Yes.

25 Q. And who brought that up?

1 Q. When you say -- I want to be clear
2 on this.

3 In raising the possibility of Kik
4 not offering Kin in Canada, you were saying
5 that Kik would do that in the event that the
6 OSC didn't get back to Kik in a timely manner
7 as to whether or not the offering was a
8 securities offering?

9 A. That would have been -- would have
10 been -- if we couldn't get -- if we wouldn't
11 get assurance from them that we were good or we
12 had concerns about it or if they proposed --
13 they came back and said it's not -- it is a
14 security -- we view it as a security and we
15 have to do all these things, then we decided we
16 -- you know, say we might distribute it outside
17 Canada and drop Canada entirely.

18 Q. Did you or anyone else state during
19 the meeting that if the OSC were to get back to
20 you and say that they thought that the offering
21 was a securities offering, that Kik would not
22 offer Kin in Canada?

23 A. I didn't say that during that
24 meeting, no.

25 Q. That wasn't discussed at all?

117

119

1 A. I would have brought it up.

2 Q. Did you bring it up?

3 A. Yeah, I believe so.

4 Q. And walk me through that discussion,
5 please.

6 A. Well, essentially, it was, you know,
7 that we -- I'm not sure -- we had subsequent
8 discussions about it as well. It may have been
9 done very much in passing at that time. We did
10 it in more detail later in our dealings with
11 the OSC, but we said, look, in the event --
12 because we wanted a response from them in a
13 timely way and we wanted a positive response in
14 a timely way, and if they decided that they
15 couldn't give us a timely response in a -- or a
16 positive response in a timely way, then we said
17 to them we always have the option of just
18 distributing outside of Canada alone.

19 That probably was as much as I
20 discussed at that point. It was more of
21 putting a stake and goading them to get back to
22 us fast. It was really more a matter of -- I
23 wasn't trying to make a position, it was really
24 more like hurry up and get back to us because
25 we have alternatives.

1 A. Not -- we said generically, that we
2 have the possibility of proceeding with the
3 offering outside of Canada alone, dropping
4 Canada, but it would have been a really brief
5 passing, it was more a matter of, you know, you
6 know we have that option.

7 Q. Other than what you've described so
8 far about the meeting in August of 2017 with
9 the OSC, can you recall anything else that was
10 said during that meeting, sitting here today?

11 A. No. I think there were comments
12 from the OSC in how they were interested in
13 being flexible and supporting innovative
14 business, that the LaunchPad was trying to be
15 receptive to issuers doing things in a new way,
16 the new technology, so that their rules had to
17 be adapted, but yet, they had an objective of
18 investor protection but they were indicating
19 they were open and flexible in considering
20 things that would suit the different aspects of
21 new businesses. That would have been part of
22 -- probably the early part of the meeting.

23 Q. One more question about the
24 discussion relating to Howey and I understand
25 you don't recall a lot about it. You said you

118

120

W. Ross McKee
12/10/2019

1 did take notes.
 2 In your notes, did you reflect
 3 anything about the Howey discussion?
 4 A. I think I might have written
 5 something like Howey old law or something like
 6 that, very brief. Just wrote a comment.
 7 Q. Sitting here today, do you recall
 8 specifically writing Howey old law in your
 9 notes?
 10 A. I don't have my notes in front of me
 11 so I don't recall. That would have been --
 12 that part of it jumped out at me. I'm wishing
 13 I said Magna Carta is old law, too, but it
 14 still applies. But I didn't make any comment
 15 back at the time. It was just a comment. It
 16 was a matter of discussion immediately after
 17 the meeting her comment among us.
 18 MR. HOTZ: Don't reveal discussions
 19 with the client after the meeting. That is
 20 privileged, and we are not waiving that
 21 privilege.
 22 BY MS. D'ALLAIRD:
 23 Q. Mr. McKee, I have just handed to you
 24 what was previously marked as Exhibit 113. You
 25 can see that marking in a stamp on the very

1 By teleconference, there is Nancy
 2 Wojtas, Cooley, LLP, U.S. counsel for Kik, and
 3 you said Nancy Wojtas was in fact on the phone.
 4 In addition to that, Karen Ubell was
 5 also on the phone from Cooley?
 6 MR. HOTZ: Objection. Asked and
 7 answered.
 8 BY MS. D'ALLAIRD:
 9 Q. You can answer.
 10 THE WITNESS: Yes.
 11 BY MS. D'ALLAIRD:
 12 Q. And then further down the e-mail:
 13 "OSC attendees will include Pat Chaukos."
 14 You said that she was there. Amy
 15 Tsai, she was also there. Neeti Varma, was she
 16 present at the meeting?
 17 A. I don't recollect. Probably. She
 18 is from the investment funds branch of the OSC.
 19 Q. Do you recall her saying anything
 20 during the meeting?
 21 A. No.
 22 Q. Jonathan Yeung, I think you said
 23 that he was also there?
 24 A. Yes.
 25 Q. Who is he?

121

123

1 last page of this exhibit.
 2 Please take a moment to review.
 3 It's an e-mail dated August 14, 2017.
 4 Let me know when you are ready for
 5 my questions.
 6 A. Yep.
 7 Q. Mr. McKee, do you recognize Exhibit
 8 113?
 9 A. Yes.
 10 Q. Did you receive the e-mail that we
 11 see at the top of the chain here on the first
 12 page of Exhibit 113?
 13 A. Yes, I did.
 14 Q. What does this e-mail relate to?
 15 A. This is from the meeting organizer
 16 arranging the meeting on August 14.
 17 Q. The meeting organizer from the OSC?
 18 A. From the OSC, Amanda Barone.
 19 Q. Amanda Barone. I just want to walk
 20 through a little bit of this e-mail just to
 21 confirm who was there.
 22 So the e-mail says: "Good morning,
 23 Ross. As per your e-mail, here are details
 24 confirming today's meeting with the OSC
 25 LaunchPad team."

1 A. He's from the registration branch,
 2 dealer registration branch.
 3 Q. Did he say anything during the
 4 meeting?
 5 A. I don't recall.
 6 Q. Timothy Baikie is listed under his
 7 name, B-A-I-K-I-E, and who is he?
 8 A. He is with marketplace regulation
 9 from the OSC. I don't recall him being --
 10 participating in the meeting but he may have
 11 been part of that at the far end. I don't
 12 think he spoke.
 13 Q. And then on behalf of Kik
 14 Interactive, you said all these individuals
 15 were present, Mr. Livingston, Mr. Heinke, Mr.
 16 Philip? Is it Philip or Philp?
 17 A. Philp.
 18 Q. P-H-I-L-P, and then yourself.
 19 A. Yes.
 20 Q. Okay. Thank you. I will take that
 21 back.
 22 After the August 14 meeting at the
 23 OSC, what happened after that? What was your
 24 next contact with the OSC in relation to Kik's
 25 offering of Kin?

122

124

W. Ross McKee
12/10/2019

1 **A.** There was the publication -- there
2 were e-mails back and forth with the OSC during
3 the latter part of August. There was the
4 publication of the CSA guidance, 45307, which
5 was frankly a disappointment. The guidance was
6 very skimpy, basically said Pacific Coast Coin
7 Exchange is the law and there's these four
8 prongs and you should consider whether they
9 apply. That was kind of it. I said, that's
10 it.

11 So I wrote back to the OSC after the
12 release. There also had been an exemption
13 application that the OSC granted for a company
14 called Impak, I-M-P-A-K, and in Canada, the
15 Commission was able to grant exemption orders
16 so they had released this one.

17 The OSC had drawn Impak to my
18 attention and I looked at it and I said, well,
19 it is quite different from ours. In the Impak
20 situation, the value of the tokens is fixed by
21 the company. Their tokens are redeemable by
22 investors to get money back at a price fixed by
23 the company, so if there is an expectation of
24 profit, it's directly with the company, they
25 are incumbent, and it's a redeemable security

125

1 **Q.** Did the OSC express any opinions
2 during that time about your position?

3 **A.** No. We didn't get any opinions from
4 the OSC.

5 **Q.** So I want to go back and walk
6 through in detail.

7 You said the next time that you
8 talked to the OSC was sometime later in August
9 through e-mail, I think you said.

10 **A.** It was all e-mail communications
11 pretty much.

12 **Q.** All e-mail communications after
13 that?

14 **A.** Yes. Up until September and so on.
15 It may have been very brief ones. I don't
16 recall the specific order of some of them.

17 **Q.** Leading up to the Kin offering?

18 **A.** Right.

19 MR. CADIGAN: Actually, again, just
20 for the record, if you could let her finish the
21 question, and if you could let him finish his
22 answer. Thank you.

23 BY MS. D'ALLAIRD:

24 **Q.** Mr. McKee, I have just handed to you
25 what was previously marked as Exhibit No. 115.

127

1 essentially, and so it wasn't like the Kin
2 situation at all.

3 I said that the notice, the CSA --
4 in my e-mail, I said the notice the CSA
5 published was actually useful for us because
6 they confirmed Pacific Coast Coin Exchange and
7 I reemphasized the parts of Pacific Coast Coin
8 Exchange drawing a distinction between
9 participant specie versus participant margin
10 and said you were equivalent to specie and
11 therefore, Chief Justice said it is not a
12 Securities Act issue and the rest of them said
13 the margins is what we're focused on here.

14 The example they had given -- they
15 gave two limited examples in the CSA notice
16 about uses, one of them was using tokens to
17 play video games. I said that is a Kin use
18 case for tokens to use that sort of thing.

19 So overall, it didn't affect my --
20 other than my messages overall were still the
21 view, this is -- this doesn't change anything
22 from our point of view.

23 **Q.** Your message was that it didn't
24 change anything from your point of view?

25 **A.** Yes.

126

1 You can see that on the stamp at the very last
2 page of this exhibit.

3 It is an e-mail chain. The top
4 e-mail on the very first page of Exhibit 115 is
5 dated August 22, 2017.

6 Please take a moment to review
7 Exhibit 115 and let me know when you are ready
8 for my questions.

9 **A.** Okay. Okay.

10 **Q.** Mr. McKee, do you recognize Exhibit
11 115?

12 **A.** Yes, I do.

13 **Q.** And looking at the very first page
14 of this exhibit, there is an e-mail at the
15 bottom dated August 22, 2017, at 11:38 a.m.

16 Do you see that?

17 **A.** Yes, I do.

18 **Q.** It appears to be from Ms. Chaukos to
19 you.

20 You received that e-mail?

21 **A.** Yes, I did.

22 **Q.** And Ms. Chaukos writes: "Hi, Ross.
23 Can we discuss the article below. If this is
24 an offering to the public, we would like to
25 discuss what you are providing to investors and

128

W. Ross McKee
12/10/2019

<p>1 how you will comply with resale restrictions 2 and other requirements," and she appears to 3 have cut and pasted an article below that. 4 My question is: What is your 5 understanding of why Ms. Chaukos wrote this 6 initial e-mail in the chain? 7 A. Well, the second sentence of the 8 paragraph is: "At our meeting, we understood 9 that it's institutional investors for the 10 initial capital raising," so she appears to be 11 misunderstanding the phases and was conflating 12 the initial capital raise with the SAFT and the 13 public sale and lumping them all together, so 14 that's -- she wrote this article and she was 15 saying -- she seemed to be under the impression 16 we were doing just an institutional-only sale, 17 whereas we had discussed clearly in the letter 18 and in the meeting, we were doing a SAFT sale 19 to accredited investors and the public sale of 20 Kin tokens later, and she seemed to be lumping 21 these all together by that paragraph, so she 22 was pretty confused about how we were offering 23 what. 24 Q. Your understanding was she was 25 lumping the SAFT portion of the offering and</p>	<p>1 security, it's not a distribution of securities 2 and there are no resource restrictions. 3 Q. So your understanding of her 4 confusion was that she thought there were 5 potentially no resale restrictions as to the 6 SAFT portion of the Kin token offering; is that 7 right? 8 A. No. I think she was asking what -- 9 it was clear she was mixing the two together, 10 and so she was taking the concept of resource 11 restriction and saying what are you doing about 12 the offering overall. We were -- I was 13 reemphasizing there were two different 14 offerings and so that the resource restrictions 15 of one weren't necessarily applicable to the 16 other. 17 Q. Prior to this e-mail, had anyone at 18 the OSC given you any indication that they 19 agreed with your position that the offering of 20 Kin tokens was not a securities offering under 21 Canadian law? 22 A. No. 23 Q. If you look at your e-mail response 24 at the top of the page, the first page of 25 Exhibit 115, I am looking at the last paragraph</p>
<p>129</p>	<p>131</p>

1 the Kin portion of the offering with -- into
 2 one based on the article that she cut and
 3 pasted at Exhibit 115 to you?
 4 A. She -- her expression, we understood
 5 it's institutional investors for the capital
 6 raising indicated some confusion to me in her
 7 mind.
 8 Q. With respect to resale restrictions
 9 and other requirements, what did you understand
 10 her to be referring to there?
 11 A. We know what resale restrictions
 12 are. We were talking about -- she's -- because
 13 she is not drawing a distinction between the
 14 SAFT sale to accredited investors and the
 15 public sale later on, she is pushing the two
 16 things together, and so what I was at efforts
 17 to do was to say, no, there's two different
 18 things going on here.
 19 Q. What was your understanding as to
 20 what that confusion would mean?
 21 A. Well, there are resale restrictions
 22 on distribution to accredited investors and
 23 so there would be resources applicable to
 24 those, but if you are distributing or you're
 25 selling Kin tokens to buyers and it's not a

1 -- the last full paragraph of your response.
 2 And you write, towards the end of
 3 the second to last sentence: "Under all the
 4 Canadian and U.S. legal tests" -- "not
 5 investment contracts under all the Canadian and
 6 U.S. legal tests and thus, in this case and use
 7 is not a security."
 8 What did you mean to convey to Ms.
 9 Chaukos in referring to U.S. legal tests?
 10 A. I received a call at this point, I
 11 think it's because Pacific Coast Coin refers to
 12 U.S. legal tests and has incorporated some of
 13 those into Canadian law, so the origin of them
 14 are -- as I said in my article, it's similar
 15 although not identical. I wasn't -- we don't
 16 need to persuade the OSC about the status under
 17 U.S. law. Just basically, because the tests
 18 are similar.
 19 It was just generic reasoning what
 20 the -- it was a virtual currency-type and was
 21 not an investment contract. Same way I refer
 22 to Canadian legal tests, it's not a material
 23 legal test.
 24 Q. Pacific Coast Coin, you said it
 25 refers to U.S. legal tests?

W. Ross McKee
12/10/2019

<p>1 A. Yes.</p> <p>2 Q. What U.S. legal test does Pacific</p> <p>3 Coast Coin refer to?</p> <p>4 A. It refers to the Howey case, I'm not</p> <p>5 sure the exact citations, Hawaii Market</p> <p>6 Centers, Glen Turner, and I think some other</p> <p>7 ones.</p> <p>8 Q. You can set that aside.</p> <p>9 (Deposition Exhibit 169 was marked</p> <p>10 for identification.)</p> <p>11 BY MS. D'ALLAIRD:</p> <p>12 Q. Mr. McKee, I just handed you what</p> <p>13 has now been exhibit -- what's now been marked</p> <p>14 as Exhibit No. 169. It is an e-mail chain.</p> <p>15 The first page and top e-mail of that chain is</p> <p>16 dated August 25, 2017, and it bears the Bates</p> <p>17 range of SEC-0SC-E-0000061 through 65.</p> <p>18 Please take a moment to review and</p> <p>19 let me know when you are ready for my</p> <p>20 questions.</p> <p>21 A. Okay.</p> <p>22 Q. Mr. McKee, do you recognize this</p> <p>23 e-mail chain?</p> <p>24 A. I do.</p> <p>25 Q. I want to start at the first e-mail</p>	<p>1 cryptocurrency offering."</p> <p>2 Was that the CSA staff notice that</p> <p>3 was discussed in the meeting, I think you said</p> <p>4 that, in August of 2017.</p> <p>5 A. I assume so. They didn't give us</p> <p>6 the name or numbers on the pending CSA guidance</p> <p>7 so I am guessing this is what they were talking</p> <p>8 about.</p> <p>9 Q. That's the notice that you referred</p> <p>10 to just a few moments ago when you said that</p> <p>11 during the summer at some point that notice</p> <p>12 came out?</p> <p>13 A. Yes.</p> <p>14 Q. You said you received this e-mail.</p> <p>15 Did you review this CSA staff notice</p> <p>16 when you received it?</p> <p>17 A. I did.</p> <p>18 Q. You can hold onto both of those for</p> <p>19 now.</p> <p>20 Mr. McKee, I have just handed to you</p> <p>21 what was previously marked -- or stamped on the</p> <p>22 very last page as Exhibit No. 118.</p> <p>23 Please take -- take a moment to</p> <p>24 review and let me know when you are ready for</p> <p>25 my questions.</p>
<p>1 133</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>on the chain that appears on the page that is</p> <p>Bates-stamped ending in 64. It's a few pages</p> <p>in.</p> <p>A. Yes.</p> <p>Q. Did you receive this e-mail at the</p> <p>bottom of this page from Amanda Barone dated</p> <p>August 24, 2017?</p> <p>A. I did, yes.</p> <p>Q. And who do you understand her to be</p> <p>referring to with respect to Pat and Amy in the</p> <p>sentence: "Pat and Amy had asked me to</p> <p>communicate recent media news release and CSA</p> <p>staff notice on cryptocurrency offerings."</p> <p>A. I understand that to be Pat Chaukos</p> <p>and Amy Tsai.</p> <p>Q. Do you have an understanding as to</p> <p>why Pat Chaukos and Amy Tsai would have asked</p> <p>Ms. Barone to send this recent media news</p> <p>release and the CSA staff release to you?</p> <p>A. I don't know as to why Amanda did</p> <p>anything. At the meeting, they told us there</p> <p>was guidance coming out and we should look for</p> <p>that.</p> <p>Q. The CSA staff notice in the subject</p> <p>line I see: "CSA staff notice 46307,</p>	<p>1 135</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>A. Yep, I'm ready.</p> <p>Q. This is the CSA staff notice</p> <p>referred to in Ms. Barone's e-mail to you at</p> <p>Exhibit 169; is that correct?</p> <p>A. Yes, it is.</p> <p>Q. And you said you -- you read this</p> <p>notice.</p> <p>You will see on the first page there</p> <p>is a series of footnotes.</p> <p>If you take a look at Footnote No.</p> <p>4, there is a link to a website that begins</p> <p>with: "WWW.Investor.gov."</p> <p>Do you recall if you clicked on that</p> <p>link?</p> <p>A. I don't think I did, no. I looked</p> <p>and can tell they are not Canadian so I was not</p> <p>really focused on it.</p> <p>Q. Could you tell where that was --</p> <p>A. Well, one, the first one is a U.S.</p> <p>one and the second one I think is Singapore.</p> <p>Q. The one I just read off to you --</p> <p>A. Investor.gov. One is mas.gov is</p> <p>Singapore.</p> <p>MR. CADIGAN: Again --</p> <p>THE WITNESS: Talking over. I'm</p>

W. Ross McKee
12/10/2019

<p>1 sorry.</p> <p>2 BY MS. D'ALLAIRD:</p> <p>3 Q. If you could please turn to the</p> <p>4 third page of the notice.</p> <p>5 Under the heading: "Trades and</p> <p>6 securities," five paragraphs down, there is a</p> <p>7 sentence that begins: "In determining."</p> <p>8 Do you see that?</p> <p>9 A. Which paragraph? How many</p> <p>10 paragraphs down? Five, yes, "in determining</p> <p>11 whether."</p> <p>12 Q. It's the fifth paragraph.</p> <p>13 A. Yes.</p> <p>14 Q. "In determining whether or not an</p> <p>15 investment contract exists, businesses should</p> <p>16 apply the following four-prong test, namely,</p> <p>17 does the ICO/ITO involve," and then there is</p> <p>18 four prongs.</p> <p>19 Is this the Pacific Coast Coin test?</p> <p>20 A. Largely, yes.</p> <p>21 Q. You say, "largely, yes."</p> <p>22 A. It's a simplification, but yes.</p> <p>23 Q. Understood. And these prongs were</p> <p>24 discussed during the meeting with the OSC in</p> <p>25 August 14, 2017?</p>	<p>1 conditions.</p> <p>2 Q. Do you have an understanding as to</p> <p>3 why Ms. Chaukos was sending you the Impak</p> <p>4 decision?</p> <p>5 A. It was the first exemption order</p> <p>6 granted to any token-related matter whatsoever</p> <p>7 in Canada so she thought maybe it would of</p> <p>8 interest to me but I don't know for sure.</p> <p>9 Q. And she writes -- the second or</p> <p>10 third sentence actually in her e-mail: "In</p> <p>11 light of this decision and the ICO notice, we</p> <p>12 wanted to discuss the Kik offering to the</p> <p>13 public."</p> <p>14 Do you have an understanding of what</p> <p>15 she meant there?</p> <p>16 A. Well, the ICO notice, I believe</p> <p>17 she's actually referring to their</p> <p>18 cryptocurrency offering, Staff Notice 46307.</p> <p>19 Q. That's at Exhibit 118?</p> <p>20 A. Right. So basically given this</p> <p>21 exemption and the principles of the notice,</p> <p>22 they wanted to discuss the offering.</p> <p>23 Q. And did you have an understanding of</p> <p>24 what she wanted to discuss with you?</p> <p>25 A. No. The e-mail is all I got.</p>
<p>137</p> <p>A. Overall, yes.</p> <p>Q. Going back to Exhibit 169. I just</p> <p>want to keep moving up the chain, so the next</p> <p>e-mail in the chain on that page with the Bates</p> <p>number ending in 64 is from Pat Chaukos to you.</p> <p>Did you receive that e-mail?</p> <p>A. Yes, I did.</p> <p>Q. Okay. And Ms. Chaukos writes:</p> <p>"Please find attached the Impak decision that</p> <p>was published Thursday."</p> <p>A. Uh-huh.</p> <p>Q. What was the Impak decision?</p> <p>A. This is the exemption order that I</p> <p>mentioned before. It was for a social Impak</p> <p>token based in Quebec, so it was originally a</p> <p>decision that the Quebec regulated -- Quebec</p> <p>AMF, Ontario had issued a parallel exemption</p> <p>order or something like that.</p> <p>Q. That was exemption from registration</p> <p>as a dealer?</p> <p>A. Both, it was -- no, it was just</p> <p>registration as a dealer. They were complying</p> <p>with the offering memorandum exemption, the</p> <p>statutory offering memorandum exemption, so</p> <p>they had an exemption as a dealer on some</p>	<p>139</p> <p>1 Q. As of this time, had anyone at the</p> <p>2 OSC communicated to you a position that Kik's</p> <p>3 planned offering of Kin tokens was not a</p> <p>4 securities offering under Canadian law?</p> <p>5 A. No.</p> <p>6 Q. And then just taking a quick look at</p> <p>7 your response in the e-mail, it's a few pages</p> <p>8 long.</p> <p>9 I think we can go back, it starts at</p> <p>10 the very first page of Exhibit 169 and you sent</p> <p>11 this e-mail to Ms. Chaukos; is that right?</p> <p>12 A. Uh-huh.</p> <p>13 Q. And --</p> <p>14 MR. CADIGAN: You have to answer</p> <p>15 audibly.</p> <p>16 THE WITNESS: Yes. Yes. Right.</p> <p>17 BY MS. D'ALLAIRD:</p> <p>18 Q. You write on Page 3 of the e-mail,</p> <p>19 the very end of your e-mail actually, three</p> <p>20 paragraphs up: "Those are my preliminary</p> <p>21 thoughts on the Impak offering and</p> <p>22 interpretation of CSAN 46307."</p> <p>23 Did I read that correctly?</p> <p>24 A. Yes.</p> <p>25 Q. Did Ms. Chaukos have a response to</p>

W. Ross McKee
12/10/2019

<p>1 -- let me back up. 2 So what were you trying to convey in 3 this e-mail? 4 A. Exactly what the paragraph says. I 5 said these are my views as to the -- whether 6 the Impak exemption decision equated to our 7 situation or didn't, to distinguish it from our 8 situation, and to go over the CSA notice and 9 emphasize the elements of that that were 10 supportive of our position for Kik -- in Kin, 11 and saying, you know, let me know the 12 particulars of -- if the staff views different, 13 so I still don't know whether they view it 14 differently because they haven't got back to me 15 yet. 16 Let me know what your issue is so we 17 can discuss that, because we have been quite 18 specific with -- and I was -- what this didn't 19 show is I actually sent this with yellow 20 highlighting in some of the paragraphs to make 21 it look really easy. Look, this is the law. 22 If you have issue with what we are saying and 23 looking for feedback so I was seeking -- 24 Q. I'm sorry. 25 A. So I was seeking feedback from them</p>	<p>1 other sections. I can't recall. 2 Q. What position were you trying to 3 convey as to Impak? What was your position on 4 the Impak decision? 5 A. That it was not a precedent for us 6 to, you know, say, oh, we should get the same 7 exemption that they have because we were 8 fundamentally different. Then they said, they 9 were redeemable tokens at a value fixed by the 10 issuer and that there was no other market for 11 them, there's no alternate value. Things could 12 fluctuate so it was more clearly obviously a 13 security, and quite likely so, but that wasn't 14 our situation. If you are trying to equate 15 Impak to Kik, it's not the same. 16 Q. And then what was your position as 17 to the CSA notice? 18 A. That it was overall helpful to us 19 and that it confirmed Pacific Coast as a 20 leading authority and these statements of 21 Pacific Coast that I thought were helpful for 22 our part of it and that the examples, the two 23 examples they gave were also helpful, one was 24 using it to play video games and at the other 25 end of the stream, they said an individual</p>
<p>141</p>	<p>143</p>

<p>1 on our submission. 2 MR. HOTZ: When you're -- sorry. 3 When you sent this to Ms. Chaukos, you're 4 saying you highlighted it in yellow? That's 5 what your testimony is? 6 THE WITNESS: Yes. 7 BY MS. D'ALLAIRD: 8 Q. We don't see that in Exhibit 169. 9 Do you recall which portions you 10 highlighted in this e-mail to Ms. Chaukos? 11 A. I can't recall exactly but it would 12 have been the parts, you know, the -- like, for 13 example, the Chief Justice on the top of the 14 second page, the end of the first paragraph: 15 "Spot purchases are clearly outside the 16 Securities Act," I highlighted that one for 17 sure. 18 Q. Anything else? 19 A. Part of just the grant period as 20 well. I think under investment contract: "If 21 Pacific does not properly invest the pool 22 deposit, the purchaser will obtain no return on 23 the investment regardless of the prevailing 24 value of silver." 25 There may have been other -- a few</p>	<p>1 purchases coins whose value coins, tokens whose 2 value was tied to the future profits or success 3 of the business and in this case, they opined 4 that future gain is not tied to future profits 5 of success of Kin Interactive. People don't 6 have -- it doesn't have the market fluctuation 7 I guess compared to a national currency and 8 foreign exchange. 9 MS. D'ALLAIRD: Should we take a 10 break. We can go off the record now. 11 THE VIDEOGRAPHER: Going off the 12 record. The time is 12:04. 13 (A short recess was taken.) 14 THE VIDEOGRAPHER: Going back on the 15 record. The time is 13:18. 16 MS. D'ALLAIRD: Okay. We are back 17 on the record. 18 BY MS. D'ALLAIRD: 19 Q. Mr. McKee, I have just handed to you 20 what was previously marked as Exhibit 112 as 21 you can see from the stamp that appears on the 22 very last page of this document. 23 It is an e-mail chain, on the very 24 first page, the top e-mail is dated August 3, 25 2017.</p>
---	---

W. Ross McKee
12/10/2019

1 Please take a moment to review and
2 let me know when you are ready for my
3 questions.
4 **A.** Yep, okay.
5 **Q.** Mr. McKee, do you recognize this
6 e-mail chain?
7 **A.** I do, yes.
8 **Q.** And taking a look at -- I think it's
9 the first e-mail in the chain on the second
10 page of Exhibit 112, the page with the Bates
11 stamp ending in 2098.
12 There is an e-mail at the top of
13 that page on August 3, 2017, at 10:39 a.m.,
14 Ross McKee wrote.
15 Do you see that?
16 **A.** Yes.
17 **Q.** Did you send this e-mail?
18 **A.** Yes, I did.
19 **Q.** Did you -- it doesn't show there,
20 but did you send this to Ms. Chaukos?
21 We see the next e-mail in the chain
22 is from Pat Chaukos to Ross McKee.
23 Is it reasonable to infer that you
24 sent this e-mail to Ms. Chaukos?
25 **A.** I believe I -- yes, I sent it to

1 Canadian law?
2 **A.** Yes, it could have, yes.
3 **Q.** I will take that back. Thank you.
4 (Deposition Exhibit 170 was marked
5 for identification.)
6 BY MS. D'ALLAIRD:
7 **Q.** Mr. McKee, I just handed to you --
8 I've just handed to you what has now been
9 marked Exhibit No. 170. It's an e-mail chain.
10 On the top e-mail on the first page
11 is dated September 5, 2017, and this e-mail
12 bears a Bates range of SEC-OSC-E-0000066
13 through 68.
14 Please take a moment to review and
15 let me know when you are ready for my
16 questions.
17 **A.** Yes.
18 **Q.** Do you recognize this e-mail chain
19 in Exhibit 170, Mr. McKee?
20 **A.** Yes, I do.
21 **Q.** Taking a look at the very first
22 e-mail on the chain that appears on the page
23 Bates-stamped 67.
24 At the bottom of that page, there is
25 an e-mail. It appears to be from you to Ms.

145

147

1 her.
2 **Q.** I just want to take a look at the
3 last paragraph of this e-mail beginning with
4 the sentence: "On the other hand."
5 You write: "On the other hand, if
6 regulatory indications aren't favorable, Kik
7 would proceed on the token distribution solely
8 outside of Canada to exclude Canadian token
9 purchasers pursuant to Interpretation Note 1."
10 Do you see that?
11 **A.** Yes, I do.
12 **Q.** And what did you mean to convey to
13 Ms. Chaukos by this sentence? What did you
14 mean by "regulatory indications are
15 unfavorable" -- "if regulatory indications are
16 unfavorable?"
17 **A.** Pretty much what it says. I mean,
18 this was subsequent to the letter that I had
19 sent to them. We hadn't had feedback yet from
20 the OSC. We were seeking feedback. So I said,
21 you know, if we can't get favorable feedback,
22 then we can proceed with this.
23 **Q.** Would unfavorable feedback also
24 include the OSC taking the position that Kik's
25 offering of Ken was a securities offering under

1 Chaukos.
2 Do you see that?
3 **A.** Yes, I see it.
4 **Q.** Did you send that e-mail?
5 **A.** Yes, I did.
6 **Q.** Taking a look at the last sentence
7 in the first paragraph: "We'd like to get a
8 firmer view from the OSC based upon our
9 submissions to date to avoid surprises."
10 What was your understanding of the
11 OSC's view of Kik's planned offering of Ken as
12 of the date of this e-mail?
13 **A.** I did not have a view from the OSC.
14 I had no response from the OSC about their
15 view. We sent in submissions and hadn't had my
16 replies from them giving us responses to our
17 submissions, so I was still attempting to get
18 that.
19 **Q.** So when you wrote: "Firm review,"
20 you were referring to --
21 **A.** Well, the review is one thing.
22 We're not sure where we are I think was the
23 last we heard.
24 **Q.** So I think you've implied it, but
25 you were reaching out --why did you write this

146

148

W. Ross McKee
12/10/2019

1 e-mail to Ms. Chaukos?
 2 **A.** As the last sentence of the first
 3 paragraph says, "to avoid surprises."
 4 **Q.** Meaning what?
 5 **A.** What's the OSC's view here. Are we
 6 set to go? Can we please get some feedback. I
 7 had virtually zero feedback from the OSC, just
 8 by attempts, we'd ask questions and we'd send
 9 submissions. They did not receive and did not
 10 send.
 11 **Q.** Looking up at this chain, the next
 12 e-mail appears to be from Pat Chaukos to you,
 13 Tuesday, September 5, 2017, at 5:10 p.m.
 14 Do you see that?
 15 **A.** Yes.
 16 **Q.** She writes: "Hi, Ross. Just got
 17 out of meetings. Are you available now."
 18 Do you see that?
 19 **A.** Yes, I do.
 20 **Q.** Did you speak with Ms. Chaukos at
 21 that point?
 22 **A.** Yes. I telephoned her and -- or she
 23 telephoned me, I can't remember specifically,
 24 but we had a telephone conversation.
 25 **Q.** Okay. And was it just you and Ms.

1 some discussions.
 2 She said that their review, she said
 3 -- she felt that there was a potential for
 4 someone losing money in this, and that their
 5 overwhelming purpose was investor protection,
 6 and on that basis that -- they felt that they
 7 could not agree with not a security.
 8 She said that they would be open to
 9 exemptive relief along the lines of Impak. I
 10 asked about timing of that and she said that it
 11 would not be available by September the 12th,
 12 which is when we told them the launch was
 13 planned for. If it was exactly the same as
 14 Impak and the exact same terms, it would be
 15 relatively quick through -- what is called the
 16 CSA sandbox which is their committee for
 17 exemptive reviews across Canada but, even then,
 18 not by September 12. Not a matter of a few
 19 days, it would be weeks, and if there was any
 20 difference from Impak at all, then it would be
 21 treated as a novel application and take that
 22 much longer.
 23 So I said, you know, and also, she
 24 said that -- in the discussion about why they
 25 were coming to this view or what they were

149

151

1 Chaukos on the phone?
 2 **A.** As far as I know, yes.
 3 **Q.** You didn't include anyone else on
 4 the call --
 5 **A.** I didn't include anyone else.
 6 **Q.** -- with you?
 7 **A.** There was no one else included on my
 8 call.
 9 **Q.** About how long was the call?
 10 **A.** It was brief, maybe five, ten
 11 minutes tops.
 12 **Q.** And what was discussed?
 13 **A.** She told me then that the OSC felt
 14 they did not agree with our submission that it
 15 was not a security. I asked what about my
 16 submissions in the Pacific Coast Coin Exchange,
 17 the detailed submissions I sent in and the
 18 arguments I provided.
 19 She said staff had not yet had an
 20 opportunity to complete their review of my
 21 submissions. I was somewhat dismayed by that
 22 and expressed my dismay that they were coming
 23 to this view that they did not agree with our
 24 position, without having read our position or
 25 completed their analysis of this, so we had

1 doing, it was sort of a general sense of, well,
 2 as you know, we have a general public interest
 3 responsibility, so it was sort of a general
 4 view from essentially -- she said -- and at
 5 that point, I said, well, then I think we may
 6 be having to instead, this would be the
 7 unfavorable thing we were talking about, and so
 8 we may have to proceed outside of Canada and
 9 drop Canada, but we'll -- I will discuss it
 10 with my client and see what they have to say.
 11 **Q.** I want to clarify a couple of
 12 things.

13 You began by saying that Ms. Chaukos
 14 expressed a view that the OSC felt that they
 15 did not agree with Kik's position that the
 16 offering of Kin was not a security?

17 **A.** Correct.
 18 **Q.** Do you recall specifically what she
 19 said in that regard?
 20 **A.** I think it was exactly that way. It
 21 wasn't expressed as -- it wasn't expressed as,
 22 you know, it is a security, and we do not agree
 23 with your position that it is not a security.
 24 **Q.** And then you said that you asked her
 25 about the staff's -- OSC's staff's review of

150

152

W. Ross McKee
12/10/2019

<p>1 subsequent submissions and those -- I just have 2 a moment here. 3 Are those the e-mails that we were 4 discussing a little earlier today? 5 A. Those e-mails, the letters, you 6 know, the whole -- the whole basket of all the 7 submissions we had done. Well, why. What's 8 the basis for this, and she said they hadn't 9 completed their analysis and basically weren't 10 engaging. 11 Q. I'm just going to hand back to you 12 Exhibit 169 and 115. 13 Are those the submissions you were 14 referring to with respect to subsequent 15 submissions to Ms. Chaukos for OSC staff to 16 review? 17 A. Yes. The -- my e-mail of August 22 18 to the security, my e-mail of August 25 with 19 more detailed and discussion of case law in 20 particular, and Impak in particular, and then 21 my -- the overall letter as well. 22 Q. The letter from July 25? 23 A. The discussion and the meeting as 24 well. 25 MR. HOTZ: Sorry. You talked over </p>	<p>1 if she had read those submissions at Exhibit 2 115 and 169? 3 A. It was implicit. She didn't 4 specifically mention whether she did or didn't. 5 Q. Did she express any view to you 6 about those submissions, any view on her part, 7 on Ms. Chaukos's part? 8 A. All she said was that she felt there 9 was a risk of loss for investors and their 10 primary focus was investor protection and that 11 they did not need to come to a view for certain 12 on this, because of their public interest 13 powers. She didn't say powers. Responsibility 14 was the word she used. 15 Q. I think you said at some point in 16 the call, she said then on the basis of all 17 that, they just could not agree that the 18 offering of Kin, the planned offering of Kin 19 was not a security? 20 A. That was a lead-in before the 21 reasons. She told me that it was not a 22 security. I said, okay, why. And then I said 23 what about my submissions for Pacific Coast 24 Coin Exchange in particular, because I rushed 25 it through. The notice came out in a day and I </p>
<p>153</p> <p>1 each other. The letter from July 25? 2 THE WITNESS: The letter from July 3 25 from me to the OSC and then the submissions 4 we had made during the course of the meeting on 5 August 14 as well, so the whole range of our 6 submissions didn't seem to be addressed at all. 7 BY MS. D'ALLAIRD: 8 Q. Thank you. I can take those back. 9 And so with respect to those 10 subsequent submissions in Exhibit 169 and 115, 11 I think you testified that Ms. Chaukos said 12 that the staff, the OSC staff had not completed 13 their review of those submissions? 14 A. Correct. 15 Q. Is that correct? 16 A. Their analysis was the word she'd 17 used. 18 Q. That was my next question to you. 19 Do you recall specifically what she 20 said in that regard? 21 A. The OSC staff were -- I can't 22 remember if she said "we" or the "OSC staff," 23 but I think she said the OSC staff have not 24 completed their analysis of our submissions. 25 Q. Did she give any indication to you </p>	<p>155</p> <p>1 had submissions in within 24 hours. I would 2 pull submissions together in 24 hours and they 3 couldn't review them and come to a conclusion 4 within -- what's this, like, two weeks later, 5 so I was -- anyway. 6 So -- and then the subsequent reason 7 she gave about risk of loss and investor 8 protection were after she communicated their 9 view. 10 Q. Did she say anything more specific 11 about her concern about risk of loss to 12 investors? 13 A. Just that they saw there was a risk 14 of loss. 15 Q. Do you recall anything else 16 discussed during this phone call? 17 A. No. Risk of loss, investor 18 protection, no need to come to a definitive 19 view -- definitive loaded here. 20 And then I said we would consider 21 the alternative of dropping the Canadian 22 offering and seeking it outside of Canada. 23 Q. Did Ms. Chaukos specifically use the 24 word "definitive" during this phone call? 25 A. No. </p>

W. Ross McKee
12/10/2019

1 Q. How did the phone call end?
 2 A. I said I would convey this to my
 3 client and we will see what they are going to
 4 do.
 5 Q. Going back to Exhibit No. 170.
 6 A. Yep.
 7 Q. So then moving up to the next e-mail
 8 in the chain that begins on the very first page
 9 of Exhibit 170, the e-mail appears to be from
 10 you to Ms. Chaukos on September 5?
 11 A. Yes.
 12 Q. Is this e-mail subsequent to your
 13 phone call with Ms. Chaukos?
 14 A. Yes, it is.
 15 Q. And why did you write this e-mail?
 16 A. Well, I'm not sure the "why" part of
 17 it, but what I was getting at, because there
 18 had been discussion as I mentioned about the
 19 exemption alternative and -- but the timing of
 20 that was impractical, so I was trying to strike
 21 a middle ground, the Ontario Securities
 22 Commission LaunchPad was advertised as being
 23 flexible, fast. They have a rocket ship as
 24 their logo.
 25 And I have done dozens of exemption

1 Q. You are reading from the -- I'm
 2 sorry, you're reading from the --
 3 A. I am pointing to the word "echoing,"
 4 where I said there is at least a reasonable
 5 interpretation as I highlighted the application
 6 of securities law may not be entirely clear in
 7 this area.
 8 MR. CADIGAN: Can you slow down.
 9 THE WITNESS: Sorry. I'm just
 10 quoting from the --
 11 MR. HOTZ: You just got to slow down
 12 for the court reporter.
 13 THE WITNESS: I will read: "May not
 14 be entirely clear in this case and we must
 15 admit that guidance has been thin."
 16 So what I was making the point here
 17 is that this is not a clear-cut case. We have
 18 been making submissions as to lots of reasons
 19 why this is not a security at all, and the
 20 staff seemed to be well -- one part being on
 21 the fence and the other part saying they come
 22 to a view that they don't agree with our
 23 submissions, saying, look, can we do a
 24 compromise which would be -- because the
 25 offering is so small in these particular

157

159

1 applications that take months or even years so
 2 I knew that wasn't practical and so I was
 3 basically saying, you know, how flexible are
 4 you going to be. We have, you know, the facts
 5 are that the median purchase registration in
 6 Canada is only \$2,000 so it's little small
 7 amounts going in.

8 In Impak, the -- they had different
 9 conditions depending on the level of investment
 10 and for people who were going to invest just
 11 \$22000 but not put in very much money, there
 12 was no obligation for them to be accredited
 13 investors or even eligible investors which is a
 14 defined term in the rules for a lesser amount
 15 of accredited investors particularly used in
 16 the offering and random exemption.

17 So it says, look, it appears we have
 18 a small -- investors investing a small amount
 19 of money. This was primarily outside of
 20 Canada. I said less than 5 percent in Canada.
 21 You know, we are not a bad boy. This is not
 22 some vaporware potential thing, and I said,
 23 look, I recognize there's a spectrum and I said
 24 there is at least a reasonable interpretation
 25 as I have been submitting for weeks now that --

1 circumstances, are you prepared to take an
 2 informal no-action position as long as it's,
 3 you know, \$2,000 max per person, that's okay.

4 BY MS. D'ALLAIRD:
 5 Q. And you are referring to, with no
 6 action, the paragraph under proposal --
 7 A. Yes.
 8 Q. -- in your e-mail?
 9 A. Yep.
 10 Q. With the OS -- part of the sentence
 11 there: "Would the OSC consider taking an
 12 inform no-action position."
 13 A. Correct. The idea was, the median
 14 purchase registration was \$2,000. If we put a
 15 firm cap on that and say -- because median is
 16 just, you know, mathematical median, if we
 17 limit it to \$2,000, no one in Canada can invest
 18 no more than \$2,000 period, how about letting
 19 this one go.
 20 Q. And then you write about the no
 21 Canadians alternative?
 22 A. Right.
 23 Q. You write underneath there, the
 24 first sentence: "If this is not acceptable,
 25 then as I mentioned, if it faces any

158

160

W. Ross McKee
12/10/2019

1 possibility of a threat of future OSC
2 enforcement action for selling to Ontario
3 investors, Kik would prevent Canadian
4 purchasers (currently 612) from participating
5 in the offering."

6 You wrote that?

7 A. Yes.

8 Q. Had Ms. Chaukos described the
9 potential for future OSC enforcement action for
10 selling to Ontario investors during the phone
11 call on the September 5th?

12 A. It was implicit in a sense because
13 if we were -- if they are saying we think -- we
14 don't agree with your position it's not a
15 security and we say, well, we're going to go
16 ahead anyway, then, you know, I think the
17 reasonable expectation is the OSC might
18 consider to do something.

19 I also said there was a possibility,
20 not probability, but that's my job is to avoid
21 possibility.

22 Q. Did Ms. Chaukos ever reply to your
23 proposal in Exhibit 170?

24 A. I recall she replied in a brief
25 e-mail saying we can't do no actions which

1 to you dated September 6, 2017. "Good morning,
2 Ross."

3 Do you see that? Then there is an
4 e-mail following that. It goes on to the next
5 page.

6 A. Yes.

7 Q. Do you see that?

8 A. Yes, I see it.

9 Q. Did you receive that e-mail?

10 A. Yes, I did.

11 Q. It looks like, if you turn to the
12 next page, this is her e-mail response to your
13 e-mail that we just saw on the previous Exhibit
14 170 where you set out another idea proposal; is
15 that right?

16 A. Yes. This is the thing I was
17 referring to which said we can't provide no
18 action letters and shot down the proposal.

19 Q. Why can't the OSC provide no action
20 letters?

21 A. Well, it kind of gives my advice as
22 a Canadian lawyer.

23 MR. HOTZ: Hold on. We are not
24 asking for the legal advice to the client on
25 this. I think it's a factual question.

161

163

1 wasn't -- put it this way, so -- I just -- she
2 responded saying we just can't do no actions
3 and that's why I didn't -- that's why used the
4 word informal because I know we don't do no
5 actions but I was asking what their position
6 might be, but she responded to the negative.

7 Q. Okay. And I can take back Exhibit
8 170. Thank you.

9 Mr. McKee, I've just handed to you
10 what was previously marked as Exhibit No. 124
11 which is shown by a stamp on the last page of
12 this document. It is an e-mail chain with the
13 top e-mail on the chain on the first page of
14 Exhibit 124 is dated September 7, 2017.

15 Please take a moment to review this
16 document and let me know when you are ready for
17 my questions.

18 A. Okay.

19 Q. Mr. McKee, do you recognize the
20 e-mail chain on Exhibit 124?

21 A. Yes, I do.

22 Q. If you take a look at the page --
23 about three pages in, the page ending in Bates
24 No. 85, do you see that at the very bottom?

25 There is an e-mail from Pat Chaukos

1 If you can answer as a factual
2 question why the OSC cannot provide a no action
3 letter, do so without revealing legal advice to
4 the client.

5 THE WITNESS: Sure. The Canadian
6 security regulators have in place a system of
7 exemption applications, where even if the law
8 applies, the commission has the ability to
9 waive any aspect of the law or certain aspects
10 depending on particular sections of it, either
11 on conditions or not, but those are specific to
12 the applicant for a particular fact situation
13 and they don't have a formal procedure by which
14 they can say certain -- we do certain things,
15 certain aspects of the law will not apply to
16 you, they can be relied upon others generally.

17 They have administrative discretion
18 at all times, but we don't have any formal no
19 action type of system the way the SEC does, for
20 example, as I understand it.

21 BY MS. D'ALLAIRD:

22 Q. Then she writes in the next sentence
23 -- Ms. Chaukos: "To confirm, did you mean
24 exemptive relief."

25 Do you see that?

162

164

W. Ross McKee
12/10/2019

1 **A.** Yes. I see that sentence.
 2 **Q.** The next e-mail on the chain, also
 3 dated September 6, 2017, that is on -- that
 4 begins on Page 84, Bates Stamp 84.
 5 Do you see that?
 6 **A.** Yes, I do.
 7 **Q.** And you write that: "Kik is
 8 continuing to consider its alternatives," and
 9 then moving up the chain to the first page of
 10 Exhibit 124, there is an e-mail from Pat
 11 Chaukos to you, very bottom of the page, also
 12 dated September 6.
 13 She writes in the third sentence of
 14 that e-mail: "In light of the tight timeline
 15 regarding the public sale, please let us know
 16 when you expect to hear back from your client
 17 on the alternative they would like to take."
 18 The date of this e-mail is September
 19 6, 2017. Is that -- that's about a week before
 20 the scheduled September 12, 2017, launch date
 21 for the Kin token offering, correct?
 22 **A.** I don't recall the specific date of
 23 the launch but it is about that time, yes.
 24 **Q.** And then you reply at the very top
 25 of the page of Exhibit 124: "Pat, Kik has

1 **BY MS. D'ALLAIRD:**
 2 **Q.** Are you going to comply with Kik's
 3 counsel's instruction?
 4 **A.** Yes, I am obliged to comply with
 5 Kik's counsel's instructions. It's my
 6 professional responsibility as their lawyer.
 7 **Q.** I can take that back. Thank you.
 8 After this last communication with
 9 Ms. Chaukos where you said that Kik was going
 10 to proceed without offering Kin in Canada, were
 11 there any subsequent communications with the
 12 OSC about Kik's offering of Kin?
 13 **A.** Yes. There was an e-mail from the
 14 -- from Pat Chaukos at the OSC after the launch
 15 was announced saying they had heard this in the
 16 media or it may have been actually subsequent
 17 to my e-mail that you just provided to me where
 18 she replied saying, yes, we were already aware
 19 of this from media reports and we were
 20 disappointed.
 21 **Q.** She was already aware that Kik had
 22 decided not to offer Kin in Canada?
 23 **A.** Right, yes.
 24 **Q.** Had you seen media reports showing
 25 that?

165

167

1 decided in the circumstances to proceed without
 2 Canada, so for launch" purchasers -- "purchases
 3 in Canada will be restricted as I outlined, all
 4 of 72-503 CP principles."
 5 Did I read that accurately?
 6 **A.** Yes. Though you said it's a reply.
 7 My original reply is earlier on September the
 8 6th. I said much appreciated. I will let you
 9 know as soon as I can," so this was a follow
 10 up.
 11 **Q.** Follow up. Thank you for
 12 clarifying.
 13 Did Kik ultimately offer Kin in
 14 Canada?
 15 **A.** They did not. They sold it to some
 16 employees in Canada pursuant to an employee
 17 exemption, but not to the general public, no.
 18 **Q.** And did Kik not offer Kin to the
 19 public in Canada on the basis of the OSC's
 20 position with respect to the Kin offering?
 21 MR. CADIGAN: Objection. Instruct
 22 you not to answer.
 23 MS. D'ALLAIRD: And that is on the
 24 basis of privilege?
 25 MR. CADIGAN: Yes.

1 **A.** Not before I sent that e-mail, no.
 2 **Q.** How was it announced in the media,
 3 do you know?
 4 **A.** The company published -- or Ted
 5 Livingston, the CEO published a post on median.
 6 **Q.** Did you read that post?
 7 **A.** Eventually I read it, yes.
 8 **Q.** When did you first read it?
 9 **A.** I can't recall. Would have been in
 10 that day or later the next day. I'm not sure.
 11 **Q.** Mr. McKee, I've just handed to you
 12 what was previously marked as Exhibit No. 120
 13 as shown by the stamp on the last page of this
 14 document. It is a letter October 19, 2017.
 15 Please take a moment to review and
 16 let me know when you are ready for my
 17 questions.
 18 **A.** Okay.
 19 **Q.** Mr. McKee, do you recognize Exhibit
 20 120?
 21 **A.** I do.
 22 **Q.** What is it?
 23 **A.** It's a letter from Huston Loke who
 24 is the -- at the time, was director of
 25 corporate finance of the OSC to me asking

166

168

W. Ross McKee
12/10/2019

1 questions about the reliance by Kik on the
 2 distribution owed to Ontario for the
 3 distribution.
 4 **Q.** The distribution of what?
 5 **A.** Kin tokens, the public sale.
 6 **Q.** Taking a look at this letter -- I
 7 should ask you.
 8 You received this letter?
 9 **A.** Yes, I did.
 10 **Q.** You read it?
 11 **A.** I did.
 12 **Q.** Taking a look at the first paragraph
 13 of the letter about one sentence in, the
 14 sentence beginning with: "I am confirming."
 15 Do you see that?
 16 **A.** Yes.
 17 **Q.** I'm just going to read it into the
 18 record.
 19 "I am confirming that OSC staff's
 20 position is that the ITD constitutes an
 21 offering of securities."
 22 I will just stop there a moment.
 23 Do you have an understanding of what
 24 Mr. Loke meant by ITD?
 25 **A.** It's a defined term in the letter,

1 at a time. Thank you.
 2 BY MS. D'ALLAIRD:
 3 **Q.** Did I read that sentence accurately,
 4 Mr. McKee?
 5 **A.** Yes. That's what it says in the
 6 letter.
 7 **Q.** And is that sentence itself an
 8 accurate statement?
 9 **A.** No.
 10 **Q.** Okay. And why not?
 11 **A.** Because the position -- this letter
 12 was the first time the OSC staff confirmed that
 13 this distribution constituted offerings of
 14 securities writing. The last period of time
 15 was orally on September 5.
 16 No such position was communicated in
 17 the meeting on August 14. There was no
 18 discussion on August 21 at all. There was one
 19 I believe on August 22 where she said she will
 20 get back to you in the public -- Pat Chaukos
 21 told me I'll get back to you in the public
 22 sale.
 23 **Q.** Mr. McKee, had OSC staff conveyed a
 24 position to you that Kik's planned public
 25 offering of Kin was an offering of securities

169

171

1 the paragraph before, the initial token
 2 distribution.
 3 **Q.** And that would be the Kik's offering
 4 of Kin to the public?
 5 **A.** Yes.
 6 **Q.** And then reading on: "This position
 7 was previously communicated to you in a meeting
 8 with OSC staff on August 14, 2017, and in
 9 discussions on August 21, 2017, following the
 10 public announcement of the offering."
 11 Is that an accurate statement?
 12 MR. HOTZ: Object to the form of the
 13 question.
 14 MR. CADIGAN: Same.
 15 MR. HOTZ: You mean that the
 16 statement is as read -- as you read it is
 17 accurate or that the statement -- the fact of
 18 the statement is an accurate statement of the
 19 facts according to this witness's memory?
 20 BY MS. D'ALLAIRD:
 21 **Q.** I will ask you both questions. Did
 22 I read --
 23 MR. HOTZ: Objection. Compound. Do
 24 you want to do one at a time?
 25 MS. D'ALLAIRD: I'm going to do one

1 prior to Kik initiating the offering?
 2 **A.** On August 5, by telephone from Pat
 3 Chaukos.
 4 MR. CADIGAN: I'm sorry.
 5 MR. HOTZ: Objection.
 6 MR. CADIGAN: Did you say August 5?
 7 THE WITNESS: September, sorry.
 8 September 5. In the telephone call from Pat
 9 Chaukos on September the 5th, that's when they
 10 communicated that for the first time. Even
 11 then, it was, like, they said that they cannot
 12 agree with our position, that it is not a
 13 security.
 14 BY MS. D'ALLAIRD:
 15 **Q.** Okay. I can take that back. Thank
 16 you.
 17 Mr. McKee, I have just handed to you
 18 what was previously marked as Exhibit 58 in
 19 this litigation. I will note that it was
 20 previously marked as Exhibit 186 in the
 21 investigation leading to this action.
 22 It is a letter dated November 2,
 23 2017.
 24 Please take a moment to review and
 25 let me know when you are ready for my

170

172

W. Ross McKee
12/10/2019

1 questions.
 2 **A.** I'm familiar with this letter.
 3 **Q.** You ready?
 4 **A.** Yes.
 5 **Q.** Mr. McKee, do you recognize Exhibit
 6 58?
 7 **A.** Yes, I do.
 8 **Q.** And what is it?
 9 **A.** It's a letter from me to Huston Loke
 10 responding to his letter of October 19
 11 providing him with the answers he sought in
 12 that letter.
 13 **Q.** You wrote this letter?
 14 **A.** I did.
 15 **Q.** Turning to Page 8 of the letter that
 16 ends in Bates Stamp 12.
 17 **A.** Yes.
 18 **Q.** Is that your signature that appears
 19 at the end of the letter?
 20 **A.** Yes, it is.
 21 **Q.** You said this is your response to
 22 Mr. Loke's letter to you that we just looked at
 23 Exhibit 120. I can show that to you again.
 24 **A.** Yes. October 19, yes.
 25 **Q.** And, Mr. McKee, when you wrote this

1 statement based on your notes, you referred to
 2 notes, indicate?
 3 **A.** Based on my recollection and my
 4 notes.
 5 **Q.** Your notes from the August 14, 2017
 6 meeting?
 7 **A.** Yes.
 8 **Q.** And then you go on to say or to
 9 write rather: "There was no discussion on
 10 August 21. There was an exchange of e-mails
 11 between myself and Ms. Chaukos on August 22
 12 asking about a National Post article and about
 13 money services business registrations."
 14 Do you see that?
 15 And then the following paragraph
 16 that begins: "In fact."
 17 Do you see that?
 18 **A.** Yes.
 19 **Q.** I'm just going to read that next
 20 sentence into the record.
 21 "In fact, the first time that the
 22 OSC staff definitively communicated a position
 23 that the IDT constituted an offering of
 24 securities was in the telephone call to me from
 25 Ms. Chaukos on September 5 shortly before the

173

175

1 letter that we see at Exhibit 58, did the
 2 letter accurately reflect your personal
 3 knowledge at that time as of November 2, 2017?
 4 **A.** Yes.
 5 **Q.** And are the statements in your
 6 letter accurate?
 7 **A.** Yes, to the best of my knowledge.
 8 **Q.** Taking a look at the letter on the
 9 first page, in the second paragraph, the first
 10 sentence reads: "We acknowledge your
 11 expression of OSC's staff's current position
 12 that the IDT constituted an offering of
 13 securities."
 14 Do you see that?
 15 **A.** Yes.
 16 **Q.** You wrote that?
 17 **A.** Yes, I typed that.
 18 **Q.** And then in the next paragraph, you
 19 write: "The meeting on August 14 was, in fact,
 20 inconclusive. Notes indicate that the closest
 21 the OSC staff president came to expressing a
 22 position was for Pat Chaukos to say, 'I am not
 23 sure we are where you are.'"
 24 Do you see that?
 25 And this statement -- was this

1 scheduled launch date."
 2 Did I read that accurately?
 3 **A.** Yes, you did.
 4 **Q.** And is that statement accurate?
 5 **A.** I regret using the word
 6 "definitively," which has been quoted I think
 7 by the SEC in your original complaint. I don't
 8 think definitive is quite accurate. What it
 9 should have said was "finally told us anything
 10 at all," and what I was trying to say is this
 11 is the first time they expressed a position
 12 that they did not agree with the security.
 13 What I was trying to say was that he
 14 had told us, that they had told us for sure it
 15 was a security on August 14 and August 21st. I
 16 said that is not true, by the way, and it was
 17 left vague on the 14th and 22nd. We will get
 18 back to you, we will get back to you, and then
 19 finally, it wasn't until the 5th that we
 20 finally heard from them that they did not agree
 21 it was not a security so that was an accurate
 22 statement of -- the first time we heard that
 23 position. The word "definitive" was not
 24 accurate.
 25 **Q.** So your testimony is the word

174

176

W. Ross McKee
12/10/2019

W. Ross McKee
12/10/2019

1 And the point of this paragraph was
2 to first of all put on the record and challenge
3 whatever internal communications had been made
4 to Mr. Loke, who I think effectively had been
5 misinformed by his staff about how definitive
6 they had been in their communications with us,
7 so when I said "definitively," what I was
8 trying to convey was, they finally said
9 anything at all that was a position and I used
10 the word "definitive" as a short form. In
11 hindsight, I would not have chosen that word.

12 But September the 5th was the first
13 time we got any position from the OSC about
14 whether this was a security or not, and that's
15 certain.

16 BY MS. D'ALLAIRD:

17 Q. Mr. McKee, would it be reasonable to
18 say that your memory was probably better with
19 respect to the September 5, 2017 call with Ms.
20 Chaukos as of the date of your letter, November
21 2, 2017, than it is today, December 10, 2019?

22 MR. CADIGAN: Objection.

23 Argumentative.

24 THE WITNESS: Probably.

25 BY MS. D'ALLAIRD:

1 median post by Ted Livingston announcing
2 they're going to exclude Canada from the
3 offering.

4 Q. This was the median post you were
5 referring to earlier?

6 A. Yes, it is.

7 Q. And taking a look at the second
8 paragraph of this post that begins: "With this
9 decision."

10 I want to read into the record
11 beginning with the second sentence of that
12 paragraph: "Despite setting up Kin to have one
13 of the most fair TDEs to date and despite our
14 best efforts to work with the OSC, they have
15 failed to give us clear direction on when
16 Canadian securities law will or more
17 importantly will not apply."

18 Did I read that accurately?

19 A. You did, yes.

20 Q. Do you agree with that statement?

21 MR. CADIGAN: Objection. And
22 instruction not to answer on the grounds of
23 privilege and work product.

24 BY MS. D'ALLAIRD:

25 Q. Are you going to comply with that

181

183

1 Q. I will take that back. Thank you.
2 You know what, hold onto it for a second.

3 Mr. McKee, I have just handed to you
4 what was previously marked as Exhibit 58 in
5 this litigation. I'll note --

6 MR. HOTZ: 59.

7 MR. CADIGAN: 59.

8 BY MS. D'ALLAIRD:

9 Q. 59, thank you. Exhibit 59 in this
10 litigation.

11 I will note that it was previously
12 marked as Exhibit 187 in the investigation.

13 This is a document, the top of which
14 says Ted Livingston, underneath founder and CEO
15 of Kik and Kin and there is a date underneath
16 that of September 7, 2017.

17 Please take a moment to review and
18 let me know when you are ready for my
19 questions.

20 A. Okay.

21 Q. Mr. McKee, do you recognize Exhibit
22 59?

23 A. I do.

24 Q. What is it?

25 A. I believe this is a copy of the

1 instruction?

2 A. I will comply.

3 MS. D'ALLAIRD: Let's take a break.
4 THE VIDEOGRAPHER: Going off the
5 record. The time is 14:06.

6 (A short recess was taken.)

7 THE VIDEOGRAPHER: Going back on the
8 record. The time is 14:23.

9 MS. D'ALLAIRD: We are back on the
10 record.

11 BY MS. D'ALLAIRD:

12 Q. Mr. McKee, is it fair to say that
13 under Canadian law, a security includes
14 something that is called investment contract?

15 MR. HOTZ: Objection.

16 Are you going to permit him to
17 answer this?

18 MR. CADIGAN: I will let you have
19 that answer.

20 THE WITNESS: The statutory
21 definition of security in the Ontario
22 Securities Act includes as one of the clauses,
23 investment contract.

24 BY MS. D'ALLAIRD:

25 Q. And is it accurate to say that back

182

184

W. Ross McKee
12/10/2019

<p>1 in 2017, you thought that as a general matter, 2 ICOs could potentially be considered to be 3 investment contracts under Canadian law? 4 MR. CADIGAN: Objection. Instruct 5 not to answer. 6 MS. D'ALLAIRD: On the basis of 7 privilege? 8 MR. CADIGAN: On the basis of 9 privilege, yes. 10 BY MS. D'ALLAIRD: 11 Q. Are you going to comply with that? 12 A. Yes. 13 Q. Going back to the August 14, 2017 14 meeting with the OSC, is it fair to say that in 15 that meeting, you were advocating that the 16 planned offering of Kin tokens should not be 17 considered to be an investment contract under 18 Canadian law? 19 A. The public sale portion of it, not 20 the pre-SAFT sale, yes, it's fair to say that. 21 Q. And in advocating for that position, 22 you pointed to the OSC to certain precedence 23 under Canadian law; is that correct? 24 A. Yes, I did. 25 Q. And you cited to the Canadian</p>	<p>1 an investment contract is under Canadian law, 2 correct? 3 MR. CADIGAN: Objection. Asked and 4 answered. 5 BY MS. D'ALLAIRD: 6 Q. You can answer. 7 A. Pacific -- when you say "define." 8 Pacific Coast Coin Exchange is a judicial case 9 that was in part, one of the factors was an 10 investment contract. 11 Q. And in advocating for the position 12 that the public offering of Kin tokens was not 13 an investment contract, you also pointed the 14 OSC to other administrative decisions and 15 guidance such as the Impak decision, correct? 16 MR. CADIGAN: Objection. Asked and 17 answered. 18 MR. HOTZ: Objection. 19 THE WITNESS: Are we still talking 20 about the meeting of August 14 now? 21 BY MS. D'ALLAIRD: 22 Q. We are talking about the meeting of 23 August 14 and then subsequent conversations or 24 communications with the OSC. 25 MR. CADIGAN: Objection.</p>
<p style="text-align: center;">185</p> <p>1 Supreme Court decision, the Pacific Coast Coin 2 decision, which defined what an investment 3 contract was, right? 4 MR. HOTZ: Objection. 5 MR. CADIGAN: Objection. Are we 6 going to go over all of this again? 7 BY MS. D'ALLAIRD: 8 Q. Can you answer the question, please? 9 A. Well, it's two questions. Yes, I 10 referred to Pacific Coast Coin Exchange in the 11 -- in the conversation, and then you said which 12 -- which seems to be the second question as to 13 what Pacific Coast Coin Exchange stands for. 14 Q. We will take it in two parts. 15 In advocating for that position that 16 the public offering of Kin tokens was not an 17 investment contract under Canadian law, you 18 cited to the Canadian Supreme Court decision 19 Pacific Coast Coin, correct? 20 MR. CADIGAN: Objection. Asked and 21 answered. 22 BY MS. D'ALLAIRD: 23 Q. You can answer. 24 A. Yes. 25 Q. And Pacific Coast Coin defines what</p>	<p style="text-align: center;">187</p> <p>1 THE WITNESS: At the meeting August 2 14, I did not point them to other things 3 because they didn't exist yet. Impak didn't 4 come out until October or August, sorry, 5 August. 6 There was a subsequent one later on 7 in October, a different case. There had been 8 no CSA guidance published yet, so I didn't have 9 anything else to point them to. We briefly 10 distinguished the SEC facts in the DAO so -- as 11 we -- as I said earlier on, we explained that 12 the fact situation of the DAO was not our fact 13 situation, and then we discussed the principles 14 of Pacific Coast Coin Exchange as they applied 15 to Kin. 16 BY MS. D'ALLAIRD: 17 Q. As of that meeting with the OSC on 18 August 14, 2017, to your knowledge, did Kik 19 have the ability to reach out to the U.S. 20 Securities and Exchange Commission? 21 MR. CADIGAN: Objection. Instruct 22 you not to answer. 23 MR. HOTZ: Objection. 24 THE WITNESS: I can't answer that 25 question.</p>

W. Ross McKee
12/10/2019

1 MS. D'ALLAIRD: On what basis,
2 privilege?
3 MR. CADIGAN: Privilege.
4 BY MS. D'ALLAIRD:
5 Q. And you're not going to answer?
6 A. I will comply with that direction.
7 Q. Okay. Mr. McKee, have you paid any
8 legal bills related to the SEC's investigation
9 or lawsuit in this matter?
10 A. Have I paid legal bills?
11 Q. Uh-huh.
12 A. Can you clarify?
13 Q. Any bills for legal representation?
14 MR. HOTZ: Do you mean him
15 personally, do you mean his firm?
16 BY MS. D'ALLAIRD:
17 Q. Yes, Mr. McKee. I asked you, Mr.
18 McKee.
19 A. No, I have not.
20 Q. You have not. Okay.
21 Do you have an understanding of who
22 is covering those bills?
23 A. Bills for my representation here
24 or --
25 MR. HOTZ: Yes, for your

1 Q. Other than your legal bills or
2 out-of-pocket costs, such as travel expenses
3 and your hotel, are you receiving any other
4 payments in connection with your appearance
5 here today?
6 A. No.
7 Q. Mr. McKee, what did you do to
8 prepare for today's deposition?
9 A. I reviewed documents associated with
10 the representation, in particular, focusing on
11 my correspondence with Ontario Securities
12 Commission.
13 I looked at the SEC's -- I'm not
14 sure what you call it, the -- where my name
15 appears as someone who might potentially be
16 called. It was drawn to my attention by Kik to
17 let me know that I was on that list and --
18 MR. HOTZ: Do not reveal
19 communications with Kik.
20 THE WITNESS: Sorry. That document
21 said it would involve my communications with
22 the Ontario Securities Commission so I focused
23 on those and reviewed those documents.
24 BY MS. D'ALLAIRD:
25 Q. Did you meet with your attorney to

189

191

1 representation here.
2 THE WITNESS: Is that the question?
3 BY MS. D'ALLAIRD:
4 Q. That's right.
5 A. Yes.
6 Q. And who is covering those legal
7 bills?
8 A. Blakes is billing Kik Interactive,
9 our client, for my time and expenses in
10 responding to the deposition.
11 MR. HOTZ: I think she was asking
12 about your -- I thought you were asking about
13 my fees, so are you asking about his fees or my
14 fees?
15 MS. D'ALLAIRD: We were going to get
16 to that incidentals as well, so thank you for
17 answering that.
18 THE WITNESS: It's hardly
19 incidental.
20 BY MS. D'ALLAIRD:
21 Q. I am also asking about your legal
22 bills with --
23 A. Yes, my counsel, my personal counsel
24 legal bills are being reimbursed to Blakes by
25 our client Kik Interactive.

1 prepare for --
2 A. Yes, I have -- apologize.
3 Q. Let me ask it again.
4 Did you meet with your attorney to
5 prepare for today's deposition?
6 A. Yes, I did. I had some telephone
7 conversations with my attorney and then I met
8 with him in person as well.
9 Q. And did you meet with him -- when
10 did you meet with your attorney?
11 A. In person, I met with him on Sunday
12 and then on Monday.
13 Q. Sunday and Monday. For how long on
14 each day did you meet with your attorney?
15 A. On Sunday, we met for a couple of
16 hours, dinner basically, and yesterday, for
17 about -- I'm not sure, maybe five hours.
18 Q. Five hours. And you said you
19 reviewed some documents in preparation for
20 today's deposition.
21 Did you review documents with your
22 attorney during those meetings?
23 A. Yes.
24 Q. And just roughly, how many documents
25 did you review?

190

192

W. Ross McKee
12/10/2019

1 **A.** I'm not sure what you mean by a
2 document, because a lot of it was e-mail and
3 there were various threads and things attached
4 to each other and how much they count and so
5 on, I don't know. Basically, the documents you
6 have shown me today are pretty much the
7 documents that I reviewed. There's a few
8 others you haven't shown me that I reviewed
9 also.

10 **Q.** Would you say probably like a
11 one-inch binder with the documents in it?

12 **A.** About that, maybe.

13 **Q.** You said you had a couple of calls
14 with counsel to prepare for today's deposition.

15 About how many calls did you have?

16 **A.** Two or three.

17 **Q.** Two or three. When were those
18 calls?

19 **A.** During the time between the
20 deposition being arranged and last week, very
21 brief calls. They were not substantive really.

22 **Q.** And in preparing for today's
23 deposition, did you meet with Kik's legal
24 counsel in this litigation?

25 **A.** I met with them on Monday.

193

1 CERTIFICATE OF NOTARY PUBLIC
2 I, Bonnie L. Russo, the officer before
3 whom the foregoing deposition was taken, do
4 hereby certify that the witness whose testimony
5 appears in the foregoing deposition was duly
6 sworn by me; that the testimony of said witness
7 was taken by me in shorthand and thereafter
8 reduced to computerized transcription under my
9 direction; that said deposition is a true
10 record of the testimony given by said witness;
11 that I am neither counsel for, related to, nor
12 employed by any of the parties to the action in
13 which this deposition was taken; and further,
14 that I am not a relative or employee of any
15 attorney or counsel employed by the parties
16 hereto, nor financially or otherwise interested
17 in the outcome of the action.
18 Dated: December 17, 2019

Notary Public in and for
the District of Columbia

23 My Commission expires: June 30, 2020

195

1 **Q.** And who from Kik's legal counsel did
2 you meet with?

3 **A.** Mr. Cadigan and Mr. Welsh.

4 **Q.** Were they present at your meeting
5 with Mr. Hotz?

6 **A.** Yes, we met together.

7 **Q.** Were they there the entire four or
8 five hours?

9 **A.** Yes. It was at the Cooley office.

10 **Q.** Did you do anything else other than
11 what -- other than the meetings and the phone
12 calls, reviewed documents, did you do anything
13 else to prepare for today's deposition?

14 **A.** No. I don't think so.

15 MS. D'ALLAIRD: I'll pass the
16 witness.

17 MR. CADIGAN: We have no questions.

18 MR. HOTZ: I have no questions.

19 Thank you.

20 THE VIDEOGRAPHER: This marks the
21 end of the deposition of Ross McKee. We're
22 going off the record at 14:33.

23 (Whereupon, the proceeding was
24 concluded at 2:33 p.m.)

1 CERTIFICATE OF WITNESS

2 I, W. ROSS F. MCKEE, do hereby declare under
3 penalty of perjury that I have read the entire
4 foregoing transcript of my deposition testimony,
5 or the same has been read to me, and certify that
6 it is a true, correct and complete transcript of
7 my testimony given on December 10, 2019, save and
8 except for changes and/or corrections, if any, as
9 indicated by me on the attached Errata Sheet, with
10 the understanding that I offer these changes and/or
11 corrections as if still under oath.

12 ____ I have made corrections to my deposition.

13 ____ I have NOT made any changes to my deposition.

14 Signed

15 _____
16 W. ROSS F. MCKEE

17 Dated this _____ day of _____ of 20____.

18 Sworn to and Subscribed before me,
19 this _____ day of _____, 20____.

20 _____
21 Notary Public My commission expires: _____

194

196

W. Ross McKee
12/10/2019

1 ERRATA SHEET

2 Deposition of: W. ROSS F. McKEE

3 Date taken: DECEMBER 10, 2019

4 Case: SEC v. KIK INTERACTIVE, INC.

5 PAGE LINE

6 _____ CHANGE: _____

7 _____ REASON: _____

8 _____ CHANGE: _____

9 _____ REASON: _____

10 _____ CHANGE: _____

11 _____ REASON: _____

12 _____ CHANGE: _____

13 _____ REASON: _____

14 _____ CHANGE: _____

15 _____ REASON: _____

16 _____ CHANGE: _____

17 _____ REASON: _____

18 _____ CHANGE: _____

19 _____ REASON: _____

20 _____ CHANGE: _____

21 _____ REASON: _____

22 _____ CHANGE: _____

23 _____ REASON: _____

24 Signed _____

25 Dated _____

197